Volume 1, No. 5, Pages 786 to 1040,
November 24 - December 5, 1986.

KF2765
.1
.A5501

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

THE PENNSYLVANIA
STATE UNIVERSITY
LIBRARIES

FEDERAL COMMUNICATIONS COMMISSION

Mark S. Fowler, Chairman

James H. Quello
Mimi Weyforth Dawson

Dennis R. Patrick
Patricia Diaz Dennis

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 1 FCC Rcd 1 (1986)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

U. S. Depository Copy

TABLE OF CONTENTS

	Page
Dec,Las Americas Comms Inc,FM CP,Newark NJ,MM 84-115,86R-65	786
Line Power, Section 68.318(b),CC Docket No. 86-423, FCC 86-468	798
Recon., Attrib of Own in Bdcst, Cable & Newsp, MM Doc 83-46	802
NPRM, Part 90 Subparts M & S, PR Docket 86-404, FCC 86-447	809
Recon. of Western Union, Dock 78-97, Phase II, FCC 86-515	829
Dec, Pentecostal Revival Assn, Palatka Fl, MM 85-94, 86R-75	842
MO&O,SICC,KWEX-TV,SanAntonioTX,MM83-540,86R-77	844
Oversight of the Radio and TV Broadcast Rules. DA 86-103	849
HDO, CP: AM (Reedsport,Or) MM Doc 86-444 DA 86-198	852
HDO, CP: Comm FM (Port Huron, MI) MM Doc 86-438 DA 86-199	854
HDO, CP: AM (Widefield/Manitou Springs, CO) MM Doc 86-446 DA 86-235	861
HDO, CP: Comm FM (Citronelle, AL) MM Doc 86-445 DA 86-236	862
R&O, Cable Carriage of TV Signals, MM Dkt 85-349, FCC 86-357	864
Order on Recon, Cond. on J. F. Rill, Trans. of Cont., FCC 86-520	918
PN, Fully Subject Status of Contel of Va. DA 86-239	920
ERRATUM, AT&T et al., Intl. Ext. of Lines, DA 86-251	921
O&A, MCI, Intl. Ext. of Lines, DA 86-252	922
MO&O, Utica Cell, Auth to Const, DPCRTS (Utica, NY), DA86-253	923
Calif. Order Extention of Time, DA 86-256	925
R&O, Secondary Fixed Tone Signalling, PR Dkt 86-78, FCC 86-508	926
Recon., AT&T Megacom Order, CC Docket 85-326, FCC86-511	930
R&O, Amendment of Sections 43.51, 43.52, 43.54, 43.74, FCC 88-512	933
KUTE, INC., Application for review, FCC 86-518	938
Ohio Bell Section 214 Authority (Cleveland, OH), DA 86-220	942
Order, Ameritech Tariff F.C.C. No. 2, Transmittal 35, DA 86-263	947
NPRM, FM B/C STAS. (Picayune, MS), DA 86-265	948
NPRM, FM B/C STAS. (Eldon, MS), DA 86-266	950
R&O, Rate of Return Reporting Reqts, CC 86-127, FCC 86-514	952
PN, States certifying they regulate Pole Attachments, DA 86-229	966
NPRM, (Brenham, TX) DA 86-264	967
Recon, Midwest Mobilephone of Mich., Inc., DPCRTS, DA86-267	972
ISP filing requirement extension MO&O, DA 86-268	974
MO&0 TV B/C STAS. (Joliet, IL), DA 86-279	975
ORDER, FM B/C STAS. (King City, CA), DA 86-280	976
MO&O, Decl Rul re Permitted Uses of DBS Sat's FCC86-530	977
Dec, Christian Childrens Net, TV CP, Corpus Christi TX, BC 86R-78	982
DECN AND ORDER, AT&T, ACCOUNTING/COST, DOC 85-107,DA 86-125	984
Order, Signal Scrambling Inquiry DA 86-154	990
Pet. Waiver; TUECA, Revise tariff, DA 86-178	991
AT&T Communications, Inc. DA 86-181	992
MO&O, AT&T Trans 716, Cust Switched Ntwk Service, DA 86-196	993
Pacific Bell Protocol Conversion Compliance Plan, DA 86-270	996
O&A, Amsat, Auth. to Construct, DA 86-271	1005
MO&O Pet. to Deny, Auth to const, MMDS Krisar, Inc. DA86277	1007
MO&O, Pet. to Deny, MMDS of Heritage Broadcasting Co. DA 86-278	1012
MO&O, AT&T, SWC pricing, Tariff, CC Dkt 85-400, DA 86-281	1016
MO & O AUTH TO ASSIGN LIC (KBST-TV, ALBION, NE) FCC 86-510	1020
Metromedia B/cing Corp., Assmnt of License, FCC 86-509	1022
Order, NECA, Interim 800 Service, Trans. No. 167, DA 86-237	1024
Letter, Transfer of Control, CBS, FCC 86-446	1025

PN, Remand of Shurberg v. FCC, FCC 86-464 1028
PN, Remand of Winter Park Comm.,Inc. v. FCC, FCC 86-465 1029
ERR, Correcting MO&O (FCC 86-406) DA 86-1800 1030
MO&O, Hear Desig, MDS (Toledo, OH) CCDK86-457 DA 86-287 1031
HDO, CP: Non-comm FM (Augusta, GA) MM Doc 86-456 DA 86-286 1032
R&0, FM B/C STAS. (Fulton, MS), DA 86-260 1034
Erratum re B/C Transmitters, DA 86-294 1035
Kannapolis TV Co. (Kannapolis, NC) TV CP BC 82-259 FCC 86-444 1037

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

LAS AMERICAS COMMUNICATIONS, INC — MM DOCKET NO. 84-115
Newark, New Jersey — File No. BPH-821105AR

Frances Lawrence Antonin and Mary Garcia d/b/a ANTONIN AND GARCIA — MM DOCKET NO. 84-123
Jersey City, New Jersey — File No. BPH-821108AQ

CAPRICE BROADCASTING GROUP, INC. — MM DOCKET NO. 84-125
Newark, New Jersey — File No. BPH-821108AS

COMSERV BROADCAST GROUP, INC. — MM DOCKET NO. 84-128
Newark, New Jersey — File No. BPH-821108AV

MULTICULTURAL BROADCASTING, INC. — MM DOCKET NO. 84-131
Newark, New Jersey — File No. BPH-821108BE

OMNILINGUAL BROADCASTING, INC. — MM DOCKET NO. 84-137
Newark, New Jersey — File No. BPH-821108BK

For Construction Permit for a New FM Station

Appearances[1]

Bruce A. Eisen, on behalf of Las Americas Communications, Inc.; *Peter Gutmann* and *Vincent A. Pepper*, on behalf of Frances Lawrence Antonin and Mary Garcia d/b/a Antonin and Garcia; *James A. Koerner*, on behalf of Caprice Broadcasting Group, Inc.; *Richard E. Wiley, John C. Quayle, James R. Bayes, and Antoinette D. Cook*, on behalf of Comserv Broadcast Group, Inc.; *Katrina Renouf* and *Margot Polivy*, on behalf of Multicultural Broadcasting, Inc.; and *Barbara R. Feeherry, Richard F. Swift, Ann Bavender*, and *John L. Tierney*, on behalf of Omnilingual Broadcasting, Inc.

DECISION

Adopted: September 26, 1986;Released: November 25, 1986

By the Review Board: MARINO(Chairman), JACOBS, and BLUMENTHAL.

Board Member JACOBS:

1. Out of the 27 applicants who originally sought a construction permit to replace Station WHBI(FM)'s deleted facilities on Channel 290 at Newark, New Jersey, only six remain. Five of them propose Newark as their city of license: (1) Las Americas Communications, Inc. (Las Americas); (2) Caprice Broadcasting Group, Inc. (Caprice); (3) Comserv Broadcast Group, Inc. (Comserv); (4) Multicultural Broadcasting, Inc. (Multicultural); and (5) Omnilingual Broadcasting, Inc. (Omnilingual). The sixth applicant, Frances Lawrence Antonin and Mary Garcia d/b/a Antonin and Garcia (Antonin & Garcia) has proposed Jersey City, New Jersey as its city of license. By Hearing Designation Order, 49 Fed. Reg. 6994 (1984), the case was designated for a comparative broadcast hearing, and in an Initial Decision (I.D.), 101 FCC 2d 736 (ALJ 1984), presiding Administrative Law Judge (ALJ) Walter C. Miller held that a dispositive choice of communities under Section 307(b) of the Communications Act of 1934, as amended, required that Jersey City should receive its first local transmission outlet and the application of Antonin & Garcia should be granted. While not specifically setting forth conclusions under the contingent standard comparative issue, the ALJ intimated that Antonin & Garcia might win as well on that issue.

2. Phase I of this proceeding ended when exceptions to the I.D. were filed by the losing applicants, who argued, *inter alia*, that Antonin & Garcia's application could not be granted without first exploring potentially disqualifying financial and character issues against it that Comserv had unsuccessfully attempted to raise before the ALJ. *See* Memorandum Opinion and Order, FCC 84M-4219, released October 2, 1984. Phase 2 began when the Review Board agreed with the exceptors and remanded this proceeding for further hearing on four issues stemming from the failure of Antonin & Garcia's 50% principal, Mary Garcia, to pay her personal federal income tax for two years while simultaneously prosecuting her FM application. *Las Americas Communications, Inc.*, 101 FCC 2d 728 (Rev. Bd. 1985). The ALJ held the remanded hearing in September 1985 and on February 20, 1986, he released a Supplemental Initial Decision (S.I.D.), FCC 86D-11, which completely supersedes his earlier work (see S.I.D., para. 6) and is the focus of this Decision.

3. In the S.I.D., the ALJ first considered whether Antonin & Garcia was basically qualified to be a Commission licensee, since only qualified applicants are entitled to Section 307(b) or comparative consideration. *See Louis Adelman*, 29 FCC 1223, 18 RR 1062 (1960), *aff'd sub nom. Guinan v. FCC*, 297 F.2d 782 (D.C. Cir. 1961). He analyzed the four remand issues under the rubrics of false financial certification, sufficiency of funds (general financial qualifications), tax lien (for failure to pay 1981 and 1982 federal income tax), and lack of candor (not revealing tax lien). The ALJ exonerated Antonin & Garcia on the two financial issues but held that Ms. Garcia had engaged in fraudulent tax conduct and had failed to demonstrate that she was honest and responsible in her dealings with the Commission. S.I.D., Concls., paras. 7, 19. Hence, he disqualified Antonin & Garcia on character grounds, which obviated the need to revisit his earlier Section 307(b) choice of communities judgment since the remaining applicants all propose to operate at Newark. Completing the standard comparative analysis which he had started in the I.D., the ALJ narrowed the choice of applicants to Las Americas, Comserv, and Coastal Communications Company[2] (which were found to be essen-

tially equal in quantitative ownership integration credit) and finally held that Comserv's qualitative superiority in terms of auxiliary power, past broadcast experience, and female ownership made it the comparative winner. Id., paras. 44-46.

4. The proceeding is now before the Review Board on exceptions and reply exceptions filed by all of the parties (Phases I and II). We have reviewed the S.I.D. in light of these pleadings, miscellaneous motions, the oral arguments held on May 17, 1985 and July 25, 1986, and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm his disqualification of Antonin & Garcia. However, we disagree with the ALJ's ultimate comparative choice for the reasons set forth herein and grant the application of Las Americas.

5. *Disqualification of Antonin & Garcia.* Our remand order, *Las Americas Communications, Inc., supra,* was released more than six months before the Commission issued its new character qualifications policy statement, *Character Qualifications,* 102 FCC 2d 1179, 59 RR 2d 801, *recon. denied,* FCC 86-455 (1986). However, we reject Antonin & Garcia's contention that none of the misconduct found by the ALJ is cognizable under that Character Policy Statement. At the outset, we emphasize that the focus of inquiry here is not Ms. Garcia's failure *per se* to pay her personal federal income taxes for two years while simultaneously prosecuting her broadcast application, but rather the implications of that failure, and subsequent revelations of other misconduct, for the applicant's basic financial and character qualifications. As we stated in the remand order, 101 FCC 2d at 730, "an analysis by the Commission of alleged unlawful behavior is required when, as here, the allegations are essentially undisputed, appear on their face to contravene the public interest, and call into direct question an applicant's basic financial qualifications." Thus, we distinguish this case from one in which an applicant was proposed for disqualification because of tax violations alone, apart from related misrepresentations or other defects. *See Country Broadcasting Co.,* 93 FCC 2d 91 (ALJ 1982), *modified,* 93 FCC 2d 83, 53 RR 2d 293 (Rev. Bd. 1983)(disqualification based on misrepresentations without reaching ALJ's separate tax violations grounds). Furthermore, although the Character Policy Statement generally focuses only on "adjudicated," "felony" misconduct, involving "fraudulent misrepresentations," 102 FCC 2d at 1197, 1205, 59 RR 2d at 814, 819, it also recognizes that the Commission may take account of uncontested, egregious misconduct, or repeated, willful violations of law, which show that "the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee," 102 FCC 2d at 1205 nn. 60, 61, & 64, 59 RR 2d at 819 nn. 60 & 61, 820 n. 64.

6. We agree with the ALJ that Antonin & Garcia's 50% owner, Mary Garcia, engaged in such egregious, repeated misconduct in her personal affairs and before this Commission that the applicant must be disqualified on character grounds. S.I.D., Concls., para. 19. We also hold, unlike the ALJ, that Antonin & Garcia is financially unqualified and should be further disqualified for giving the Commission a false financial qualifications certification. The ALJ made extensive findings and conclusions under each of the four potentially disqualifying remand issues that were added against Antonin & Garcia. See S.I.D., Fdgs., paras. 7-38, and Concls., paras. 3-19. We will summarize the most salient points, highlighting only those areas where modifications are required.

7. *False Financial Certification Issue.* Antonin & Garcia claimed to need about $350,000 to construct and operate their proposed Jersey City station for 90 days without revenue. S.I.D., Fdgs., para. 9. On November 4, 1982, Ms. Garcia signed Antonin & Garcia's application, which was filed on November 8, and thereby certified to the truth, completeness, and correctness thereof, including Section III (Financial Qualifications). *Id.,* para. 7. In so doing, she also specifically certified that:

> "1. . . . [S]ufficient net liquid assets are on hand or are available from *committed sources* to construct and operate the requested facilities . . . .
>
> 2. . . . (a) it has a reasonable assurance of a *present firm intention for* . . . each loan by banks, financial institutions or others . . . . (c) it has determined that a reasonable assurance exists that all such sources (excluding banks . . .) have sufficient net liquid assets to meet these commitments." (Emphasis added.)

Instruction C for Section III provides: *"Documentation* supporting the attestion of financial qualification need not be submitted with this application but *must be available* to the Commission upon request" (emphasis added). And in adopting the financial certification procedure, the Commission "reemphasized that we are not, in any way, modifying the underlying substantive financial criteria . . . . " *Revision of Form 301,* 50 RR 2d 381, 382 (1981); *South Florida Broadcasting Co., Inc.,* 94 FCC 2d 452, 455, 53 RR 2d 1683, 1685 (1983).

8. At the remand hearing, it developed that Antonin & Garcia's proposed sole source of financing was Mr. Donald Lewis (Tr. 1805), the president and sole owner of Cosmopolitan Broadcasting Corporation, whose license to operate WHBI(FM) had been non-renewed by the Commission, thereby paving the way for the instant proceeding. *See Cosmopolitan Broadcasting Corp.,* 75 FCC 2d 423 (1980), *aff'd mem.,* Case No. 80-1902 (D.C. Cir. June 29, 1981), *cert. denied,* 454 U.S. 1143 (1982). Mr. Lewis agreed to lend Antonin & Garcia the entire $350,000 that it needed for application prosecution, construction, and operation in return for its undertaking to lease Lewis' WHBI(FM) facilities at $50,000 a year for 20 years. S.I.D., Fdgs., paras. 14-15. However, neither the Lewis loan nor the proposed lease was reduced to writing or protected by a security agreement or collateral. *Id.,* paras. 16, 19 & n. 14; Tr. 1928. Judge Frances Antonin, Antonin & Garcia's other 50% owner, was uncertain whether Lewis had enough of his own funds to finance their proposal, but she accepted the financial assurances of her Washington communications counsel, Vincent A. Pepper, who had been recommended by Lewis and had also done legal work for Lewis. *Id.,* para. 18; Tr. 1900-01, 2028-29. Nevertheless, "as a backup" and "to assure [herself] that [she] would be able to secure financing," Tr. 1797, 1802, 1805, Mrs. Antonin met with representatives of two different banks to inquire about bank loans. She came away from these meetings with the "personal belief" (Tr. 1799, 1801) that the banks would each lend the applicant $350,000 (Tr. 1797, 1800). However, in neither instance did Mrs. Antonin fill out a loan application or receive a written

loan commitment (Tr. 1798, 1800). Based on this evidence, the ALJ concluded that Antonin & Garcia was financially qualified as of November 8, 1982, that it had reasonable assurance that the needed funds were available, and that its financial certification was not false. S.I.D., Concls., para. 7.

9. We cannot agree with the ALJ's conclusions under this issue because we find that this is one of the most egregious cases of arrogant contempt for the Commission's processes that the Board has ever encountered. While the Board has previously expressed misgivings about general compliance with the certification procedure and has catalogued some of the improprieties, *see Dutchess Communications Corp.*, 101 FCC 2d 243, 245 n. 3, 58 RR 2d 381, 382 n.3 (Rev. Bd. 1985), this case presents such an aggregation of bunkum that "setting the record straight" herein should provide a useful restatement of the certification procedure as it was meant to operate. To the extent that theory and practice continue to diverge, the Commission will undoubtedly revisit this area of pervasive abuse.

10. The *sine qua non* for financial qualifications under prior case precedent and the new certification procedure is *written documentation*. Earlier versions of Section III of Form 301 required the submission of copies of all loan agreements with banks or individuals (setting forth loan amount, interest rate, terms of repayment, and security, if any) and the submission of balance sheets or financial statements for each person or entity except financial institutions that had agreed to furnish funds, showing all liabilities and containing current and liquid assets sufficient in amount to meet current liabilities and to satisfy the proposed broadcast commitments. *E.g.*, FCC Form 301, Section III, p.3, October 1981 ed. As indicated in paragraph 7, *supra*, present Form 301 continues to require written documentation to support "reasonable assurance" of funds. FCC Form 301, Section III, Instruction C, January 1982 ed. The only change is that now the documentation need not be *submitted* in the application process unless requested by the Commission. In short, the view espoused by Antonin & Garcia at hearing and in its pleadings that written loan agreements, written bank loan commitments, and written balance sheets or financial statements from individuals are not needed (*e.g.*, Tr. 1799) has never been the law and is not now the law under the certification procedure. The law is and remains that loan agreements and bank commitment letters must be prepared and must be sufficiently specific and complete to furnish reasonable assurance of the availability of the loans. *Jay Sadow*, 39 FCC 2d 808, 810, 26 RR 2d 1032, 1035 (Rev. Bd. 1973). Similarly, where individuals are providing funds, they must also support their undertakings with balance sheets or financial statements. *United Broadcasting Co.*, 93 FCC 2d 482, 509, 53 RR 2d 57, 81 (1983). This is so even though there is a presumption that "ownership of nonliquid assets several times the value of the cash which such assets are relied upon to yield" provides reasonable assurance of the ability to secure the required funds. *International Broadcasting Co.*, 3 FCC 2d 449, 451, 7 RR 2d 302, 305 (1966); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706, 51 RR 2d 389, 391 (Rev. Bd. 1982). Simply put, without documentary evidence of the relative sizes and amounts of nonliquid assets and liabilities, the *International* and *Cornwall* presumption of ready liquidity (needed for reasonable assurance) does not arise.

11. The wisdom of the foregoing documentary standards for reasonable assurance is well illustrated by the financial charade which Antonin & Garcia attempted to foist upon the Commission. The Board refuses to play into its hands, and concludes that Antonin & Garcia must be disqualified for filing a false financial qualifications certification lacking any documentary support and any reasonable assurance that Donald Lewis, any bank, or any other individual would furnish the necessary funds for the proposed Jersey City station. What follows are additional findings of fact by the Board (see also paragraph 8, *supra)* which illustrate how far client and counsel strayed from Commission law in arriving at and submitting the applicant's false financial certification.

12. Antonin & Garcia's communications counsel was the linchpin in its financial certification efforts. Mrs. Antonin and Ms. Garcia relied on the fact that counsel "had assured himself" that Mr. Lewis had sufficient net liquid assets to fund their proposal, but they did not know what the basis of that assurance was (Tr. 1661). The Newark applicants attempted to call counsel as a witness at the remand hearing, but Antonin & Garcia successfully sought a protective order from the ALJ on the ground that such testimony would give rise to a Canon 5 ethical problem.[3] Memorandum Opinion and Order, FCC 85M-3609, released September 16, 1985. The alternative was equally unsatisfactory in terms of a full evidentiary record, for counsel was allowed to ask leading questions of *his own witnesses* - - Donald Lewis, Mrs. Antonin, and Ms. Garcia - - in order to elicit *their impressions* of counsel's knowledge and thought processes. *E.g.*, Tr. 1803. Even so, the testimony did not provide an adequate basis for counsel's assurances or Antonin & Garcia's certification. Lewis testified that he described some of his assets to Antonin and Garcia at their first meeting (Tr. 1930), but that he never showed them a balance sheet or any other documents indicating what his assets and liabilities were (Tr. 1931). Similarly, Lewis testified that he "related to [counsel] my assets" (Tr. 1943) and "did . . . make [counsel] aware of the liabilities" (Tr. 2038), but that this information was only provided orally (Tr. 2042, 2044) and was not detailed (Tr. 2044). Finally, over objection, the ALJ also permitted Lewis to describe the value of some of his present and past assets at the remand hearing itself. Tr. 2024-28, 2037. The ALJ was ostensibly convinced that Antonin & Garcia had met its evidentiary burden concerning Lewis' means because he concluded that "Lewis' personal assets provide him with more than the financial wherewithal to live up to his end of the bargain . . . . " (S.I.D., Concls., para. 7). However, in addition to failing to hold Lewis to the proper standard of proof - -documentary evidence - - he also neglected to weigh the most serious defect in Lewis' testimony - - his admission that he is not committed to selling any of his assets in order to fund his financial undertaking to Antonin & Garcia (Tr. 2048-49). Under these circumstances, no legal basis existed to certify Lewis as Antonin & Garcia's sole source of financing. Similarly, without written loan commitment letters, the bank back-up financing that Mrs. Antonin had sought (see paragraph 8, *supra)* was not cognizable, despite Mrs. Antonin's "personal beliefs," see *Dutchess Communications Corp., supra; Central Alabama Broadcasters, Inc.*, 97 FCC 2d 654, 655, 55 RR 2d 1637, 1638 *(Rev. Bd.)*, rev. denied, FCC 84-508 (Comm'n 1984), and there is no legal basis for counsel's advice to Mrs. Antonin that she "didn't need [bank loan assurances] in writing . . . . " (Tr. 1802). Again, the

absence of any documentary evidence is fatal to the ALJ's conclusion (S.I.D., Concls., para. 7) that Antonin & Garcia had reasonable assurance of back-up bank financing for its broadcast proposal.

13. Given the prominent role that communications counsel played in Antonin & Garcia's financial certification, the question arises whether the applicant deserves the ultimate sanction of disqualification for misconduct undertaken with counsel's advice. Good faith reliance on counsel may constitute sufficient mitigation to avoid disqualification for a variety of Commission delicts. *See, e.g., Cumberland Broadcasting Corp. v. FCC*, 647 F.2d 1341, 1344-45 (D.C. Cir. 1980); *WEBR, Inc. v. FCC*, 420 F.2d 158, 168 (D.C. Cir. 1969). However, in the instant case where the applicant's two principals are practicing lawyers, and where the applicable Commission law is clearly stated on the instructions to the application form and in published opinions, we cannot hold that they, or their counsel, were innocent, lay dupes. Indeed, in Antonin & Garcia's reply brief (at 15), counsel states that he "functioned both as . . . legal counsel and as an expert advisor in view of his own past broadcast experience." Under these circumstances, we reluctantly conclude that the applicant's misconduct here was the type of "see no evil" deference to counsel and intimate involvement and acquiescence that warranted condemnation and disqualification in *Belo Broadcasting Corp.*, 68 FCC 2d 1479, 43 RR 2d 1633 (1978), *aff'd sub nom. WADECO, Inc. v. FCC*, 628 F.2d 122 (D.C. Cir. 1980). See *Margaret J. Hanway*, 59 RR 2d 1296 (Rev. Bd.) *rev. denied*, FCC 86-476 (Comm'n 1986); *Hillebrand Broadcasting, Inc.*, FCC 86-426, released November 6, 1986. This disqualification is sufficient to remove Antonin & Garcia from further consideration in this proceeding, but we will briefly address the remaining disqualifying issues against it because of their independent significance and cumulative impact.

14. *Financial Qualifications Issue.* The premise underlying the addition of this issue in the remand order, *supra*, 101 FCC 2d at 731, was the inference from Antonin & Garcia's response to the enlargement motion that its two principals were responsible for financing the application out of their own funds and that these funds might be inadequate. Because the enlargement motion revealed that Ms. Garcia had not paid her personal federal income taxes for 1981 and 1982 - - during the early pendency of the broadcast application - - it appeared that Ms. Garcia might have deliberately chosen not to pay her taxes so that she could fund her FCC proposal or otherwise demonstrate her FCC financial qualifications. *Id.* However, at the remand hearing, the principals testified that although they had each contributed about $2000 of their own funds toward the prosecution of their application, S.I.D., Fdgs., para. 26, Mr. Donald Lewis was actually the proposed sole source of financing from the beginning (see paragraph 8, *supra).* Because we have already concluded in paragraphs 11 and 12, *supra* , that Antonin & Garcia did not have reasonable assurance of funding from either Mr. Lewis or any banks at the time its application was filed in November 1982, and was thus not financially qualified at that time, the only remaining question under this issue is whether Antonin & Garcia *subsequently became* financially qualified.

15. The ALJ concluded that Antonin & Garcia was at all times financially qualified because of Mr. Lewis' financial arrangement with the applicant and because of the back-up bank financing that Mrs. Antonin explored with two banks in 1982. S.I.D., Concls., para. 7. Hence, he refused to allow into evidence a September 16, 1985 $350,000 letter of credit from the First Jersey Bank and other documents as an untimely, irrelevant, and disruptive new financial proposal, Tr. 1844; Antonin & Garcia Exhs. R-2 and R-4, and denied a subsequent attempt by Antonin & Garcia to amend its application to reflect this new (or alternative) financial plan. Memorandum Opinion and Order, FCC 85M-4241, released October 31, 1985. Because we agree that Antonin & Garcia's new financial proposal is untimely and otherwise lacks good cause for acceptance at this late date, we affirm the ALJ's refusal to take cognizance of it and conclude that Antonin & Garcia is not financially qualified.

16. The ALJ established September 3, 1985 as the deadline for the exchange of any exhibits relating to the remand issues. Memorandum Opinion and Order, FCC 85M-2718, released July 8, 1985. Antonin & Garcia ignored that deadline and instead exchanged its new financial proposal at the "13th hour" - - on the second hearing day (September 19, 1985) of the remand proceeding and almost three months after the June 28, 1985 release of the remand order containing the financial qualifications issue. Moreover, when the ALJ rejected the exhibit at hearing, Antonin & Garcia waited almost another whole month - - until October 15, 1985 - - before filing it as a proposed application amendment. Hence, Antonin & Garcia's new financial proposal clearly fails the good cause requirements of due diligence and non-disruptiveness in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 18 RR 2d 820 (Rev. Bd. 1970), which apply to late-filed amendments even where they are intended to meet a disqualifying financial issue. *Dutchess Communications Corp., supra.* Here, Antonin & Garcia was on legal notice from June 28, 1985 that its financial proposal was suspect, and the *Erwin O'Conner* implications of our financial certification conclusions, *supra*, are that actual notice predated November 8, 1982, when its application was originally filed. Nevertheless, Antonin & Garcia waited until the middle of the remand hearing itself before suddenly proffering an exculpatory financial exhibit which would have required additional preparation and hearing time for proper consideration. (The exhibit was not even obtained until two days before the remand hearing began.) Such lackadaisical sandbagging is anathema to a fair and orderly hearing process and has not been justified by Antonin & Garcia here. *See Colorado Television, Inc.*, 98 FCC 2d 513, 518 n. 6, 56 RR 2d 1080, 1084 n. 6 (Rev. Bd. 1984), *rev. denied*, FCC 85-437 (Comm'n 1985), *appeal dismissed mem.*, No. 85-1526 (D.C. Cir. Oct. 15, 1986)(later amendment cannot substitute for earlier proposal which was defective *ab initio); North American Broadcasting Co., Inc.*, 21 FCC 2d 631, 18 RR 2d 452 (Rev. Bd. 1970)(post-hearing financial amendment rejected which attempted to correct shortcomings in applicant's financial showing revealed at the hearing); *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

17. *Tax Lien, Candor, and Reporting Issues.* As with the financial qualifications issue, *supra*, we added the tax lien issue to this proceeding essentially out of concern for the implications of the lien and the underlying non-payment of personal federal income taxes for 1981 and 1982 on Mary Garcia's and the applicant's financial qualifications. *See* 101 FCC 2d at 731. In addition, it preliminarily appeared to us that Antonin & Garcia's failure to notify the Commission of the existence of the lien on its own

reflected a lack of candor and a violation of the reporting requirements of Section 1.65 of the Commission's Rules, 47 CFR 1.65. *See* 101 FCC 2d at 732. (To the extent that language in the remand order implied a final conclusion that Section 1.65 had been violated, it was in error, but we do not believe that Antonin & Garcia was prejudiced by any such implication in the trial of the issue.)

18. In the S.I.D., Concls., paras. 8-19, the ALJ held that Mary Garcia's alleged non-payment of federal income taxes for 1981 and 1982 was monumentally and tragically "more ominous" than that. Rather, Ms. Garcia began her private law practice in 1980, but did not file any federal income tax returns, let alone pay the taxes, for 1980, 1981 and 1982 until September 1983. On April 15, 1984, Ms. Garcia filed her 1983 federal income tax return (on time) but included no money. The tax lien in question ($11,525) was imposed in April 1984 for calendar years 1981 and 1982 and was paid in full in September 1984, after the matter was raised by opposing applicants during Phase I of this proceeding. S.I.D., Fdgs., paras. 28-38. Furthermore, the ALJ concluded that Ms. Garcia and her counsel had made "abjectly false" representations to him and to the Review Board in pleadings and at oral argument (S.I.D., Concls., paras. 9-19, and Fdgs., para. 29 n. 17), which led - both adjudicatory bodies to believe that Garcia's problem "was merely one of tax delinquency and not tax evasion." Finally, the ALJ held that Ms. Garcia had dissembled concerning the reasons for the non-payment of her taxes, originally asserting that the money was used for her law practice start-up expenses but later admitting that she had spent the money "elsewhere" and that her "discipline was nonexistent and the priorities were wrong." S.I.D., Concls., para. 18, and Fdgs., para. 37; Tr. 2296. From the foregoing, the ALJ reached the ultimate conclusion that Ms. Garcia had engaged in tax evasion, had intended to defraud and did defraud the federal government by not filing three federal tax returns, and had made several false representations to the Commission, thereby failing to "demonstrate that she is an honest and responsible person" and requiring the denial of Antonin & Garcia's application on character grounds. S.I.D., Concls. para. 19.

19. Antonin & Garcia's exceptions on this issue do not attempt to hold Ms. Garcia blameless for her tax abuses. Rather, the applicant pleads that Ms. Garcia "is presently profoundly embarrassed and ashamed over the entire matter" but "did not commit the felony of tax evasion nor the felony of fraud before the IRS. By default, the worst that can be said of her conduct is that it constituted the misdemeanor [of willfully failing to pay taxes and file tax returns] . . . [and] none of the misconduct found with respect to Ms. Garcia is of the type cognizable under the Commission's new Character Policy Statement." Antonin & Garcia Br. at 13-14, 15. Hence, according to Antonin & Garcia, the ALJ erred in disqualifying the applicant on these grounds. As to the false representations by Ms. Garcia and her counsel to the ALJ and the Review Board concerning why Ms. Garcia had not paid her taxes and concealing that she had also not filed her tax returns, Antonin & Garcia denies that there were any misrepresentations or lack of candor and asserts that, in any event, there was no deceptive intent and that disqualification would be too severe a sanction for lack of candor. *Id.* at 19-23. Finally, Antonin & Garcia urges that Ms. Garcia's non-disclosure of the 1984 tax lien against her did not violate Section 1.65 reporting requirements because, as the ALJ himself concluded in S.I.D., Fdgs., para. 27, the lien was not material since no nexus between it and the applicant's financial qualifications was established.

20. We wholeheartedly support the ALJ's disqualification of Antonin & Garcia under these issues and do not believe that such disqualification is inconsistent with the Commission's Character Policy Statement. As we discussed in paragraph 5, *supra,* the Policy Statement does not rule out disqualifications based on uncontested misconduct or repeated, willful violations of law which show that an applicant lacks the traits of reliability and truthfulness necessary to be a licensee. Under Chapter 75 of the Internal Revenue Code of 1954, as amended (Crimes, Other Offenses and Forfeitures), Garcia's admitted failure to file income tax returns for three consecutive years is, at minimum, an uncontested violation of 26 U.S.C. §7203, *Sansome v. U.S.* 380 U.S. 343, 351 (1965), a federal misdemeanor. And the *Sansome* Court stated that "an intent to report and pay tax in the future does not vitiate the willfulness requirements" of §7203. 380 U.S. at 352. *See also U.S. v. Pomponio* , 429 U.S. 10 (1976) ("evil motive" not necessary to establish "willful" violation of §7203). Garcia's admitted criminal conduct was emphasized by her own attorney at our May 17, 1985 oral argument (Tr. 1361):

> Chairman Marino: "You are not violating any federal law when you fail to pay your taxes?"
>
> Counsel: "Not if you file your return."

That answer was as misleading as it is incriminating, for the remanded record is now clear that Garcia did not, in fact, file her federal tax returns for 1980, 1981, or 1982. Thus, Antonin & Garcia's arguments to the effect that her failure to *pay* her taxes should not be held against here are beside the point: by her own admissions, she willfully and flagrantly failed to even *file* her tax returns, in stark violation of Title 26, U.S.C., even though she was acutely aware that she had taxable income and that filing was mandatory. S.I.D, Fdgs., para. 33. In the instant case, we hold that Ms. Garcia's three years of willful and repeated failures to file her federal income tax returns and pay her taxes, even if "only" misdemeanors, are egregious acts of misconduct for a member of the New Jersey Bar, a member of the "Ethics Committee of the State of New Jersey for Hudson County, Jersey City (the attorney disciplinary board serving Hudson County)" [Antonin & Garcia Exh. 2, p. 2], and a would-be Commission licensee. [4] However, we need not base Antonin & Garcia's disqualification on this misconduct alone, but rely also on the extensive candorless cover-up of which it is an integral part.

21. The Antonin & Garcia cover-up began with the applicant feigning that Antonin and Garcia were personally funding the application (see paragraph 14, *supra),* which led the Board to infer - - properly we believe - - that an undisclosed tax lien and unpaid taxes raised material questions about one of the putative financial source's (Garcia) financial qualifications.[5] While it is true that Comserv Exh. 14 shows that Ms. Garcia expended $2600 between November 1982 and July 1985, which she testified represented just about all of her application outlays (Tr. 2247), and that only $850 of that amount was spent prior to her satisfying the $11,525 tax lien in

September 1984, it is clear that this $850 could have been used - - and should have been used - - to pay her taxes instead of funding her broadcast application. To this extent we reject the ALJ's finding that there was no nexus between the tax lien and the entities who *appeared* to be financially responsible for the applicant. With hindsight, the Board *now knows* that Garcia was not intending to fund the application significantly. Nevertheless, the teaching of *KOKA Broadcasting Co.* , 56 FCC 2d 191, 35 RR 2d 384 (Rev. Bd. 1975), is that appearances of decisional significance count for Section 1.65 reporting purposes. Thus, under *Radio Laredo, Inc.* , 87 FCC 2d 353, 49 RR 2d 1489 (Rev. Bd. 1981), *rev. denied* , FCC 82-62 (Comm'n), *aff'd per curiam sub nom . Amigos Broadcasting, Inc.* v. FCC, 696 F.2d 128 (D.C. Cir. 1982), a comparative demerit for Antonin & Garcia's non-disclosure of Garcia's uncontested tax lien in violation of Section 1.65 would be appropriate here, but obviously non-decisional.

22. Antonin & Garcia's next cover-up was its failure to disclose that Garcia had not filed any personal federal income tax returns for 1980, 1981, and 1982, let alone paid the taxes due, until September 1983, and the false impression/misrepresentation created in its pleadings and at oral argument that only non-payment was at issue. See S.I.D., Fdgs., para. 29 n. 17, and Concls., paras. 9-10. We reject Antonin & Garcia's limp argument that there could be no intent to deceive on these facts because there was no nexus between these tax abuses and the applicant's financial qualifications. See paragraph 21, *supra*. Because these matters arose before the Commission's new Character Policy Statement was adopted, Antonin & Garcia had even greater reason than now (see paragraph 20, *supra)* to obfuscate about law violations which might adversely affect its character qualifications. That is what happened here. But for the remand proceeding that the Board ordered, the Commission would never have learned about Garcia's non-filings.

23. The final cover-up concerned Garcia's varying stories about why she did not pay her taxes promptly and how she spent the funds that should have been used for that purpose. We reject Antonin & Garcia's view that there were no variances in the explanations offered and that all of the funds were used for start-up business expenses. See paragraphs 18 and 21, *supra*. Again we perceive ample motivation - - concern that adverse financial or character qualification judgments would be made if the Commission learned that Garcia, a putative funding source, was unwilling or unable to pay her federal income taxes or was using tax funds to prosecute her broadcast application.

24. In *Old Time Religion Hour,* Inc., 95 FCC 2d 713, 54 RR 2d 989 (Rev. Bd. 1983), *rev. denied* , FCC 85-104 (Comm'n 1985), and in *Country Broadcasting Co., supra,* as well as in the new *Character Policy Statement* , *supra,* 102 FCC 2d at 1210-11, 59 RR 2d at 823, the Commission has made it abundantly clear that misrepresentations or lack of candor on the part of would-be licensees in Commission proceedings will not be tolerated and are grounds for disqualification. The disgraceful conduct reviewed in paragraphs 21-23, *supra,* merits that full measure of condemnation. And when the tax abuses involving another federal agency are added thereto (paragraphs 17-20, *supra),* a thundering overall disqualification is mandated. *Country Broadcasting Co., supra* (disqualification for misrepresentations to FCC *Focus Television Co.,* FCC 86-444 (Comm'n 1986), *modifying* 98 FCC 2d 546, 56 RR 2d 1335 Rev. Bd. 1984) (disqualification for false representations to bankruptcy court). Having ruled that Antonin & Garcia is disqualified under each of the four remand issues, we will exclude it from comparative consideration with the four remaining applicants, to whom we now turn.

25. *Diversification of Control.* Under the diversification of control of mass media criterion of the *Policy Statement on Comparative Broadcast Hearings* , 1 FCC 2d 393, 5 RR 2d 1901 (1965), the ALJ concluded that only Multicultural had any cognizable and attributable other media interests, and he assessed a substantial comparative demerit because of four such holdings by Multicultural's 100% owner, Arthur S. Liu. S.I.D., Concls., paras. 22-27. Specifically, Mr. Liu and his wife jointly own 100% of a full- time commercially supported Chinese language radio service which is broadcast on an SCA channel of Station WHTZ-FM, Newark, New Jersey, and has listenership of 50,000 to 100,000 persons; they jointly own 8% of Greater Chinatown Publishing, Inc., which publishes the *Sino Daily Express,* a Chinese language newspaper with a 25,000 to 27,000 circulation in the New York metropolitan area; they jointly own 24.5% of a three-hour per day Chinese language subscription radio service using leased channel space on an ITFS frequency in New York, New York; and Mr. Liu owns 18% of full-time commercially supported Chinese language radio service which is broadcast on an SCA channel of Station KDFC-FM, San Francisco, California. *Id.;* Multicultural June 28, 1985 Information Statement. Multicultural's exceptions maintain that no demerit at all is warranted because Mr. Liu's SCA and ITFS activities are "program services," rather than independent media interests, and the Chinese newspaper is a *de minimis* media interest, because the Chinese population of Newark is only 357 and the paper has only about 100 subscribers in the entire State of New Jersey. On the other hand, Multicultural and Caprice urge that the ALJ erred in not assessing at least a slight diversification demerit against Comserv because its non-voting stockholder W. Don Cornwell is on the citizens advisory board of New York City-owned Stations WNYC-AM, FM, and TV, and its non-voting stockholder Stuart J. Beck is counsel to Beck-Ross Communications, Inc., a family business owning multiple broadcast stations in the New York area and elsewhere.

26. Until the Commission's *First Report and Order in BC Doc. No. 82-536* , 48 Fed. Reg. 28445 (1983), Section 73.293 of the Rules, 47 CFR 73.293, required a Subsidiary Communications Authorization (SCA) before an FM licensee would be allowed to transmit programs "of a broadcast nature" to subscribing members of the public on a subcarrier within the station's FM baseband signal. In the *First Report, supra,* the Commission dropped its prior authorization requirement and renamed Mr. Liu's type of specialized programming and other SCA offerings "subsidiary communications services," (new Section 73.295). As with ITFS (the Instructional Television Fixed Service), another specialized programming vehicle whose licensees may now lease their excess channel capacity to programmers such as Mr. Liu, *Instructional TV Fixed Service* , 94 FCC 2d 1203 (1983), special receiving equipment is required for subscribers, even though a "broadcast signal" is involved. Although we have not had occasion to decide whether SCA and ITFS programming interests are cognizable for diversification purposes as a matter of law, we have held that subscription television

(STV) programming interests are not cognizable *per se, Colorado Television, Inc., supra,* 98 FCC 2d at 522 n. 11, 56 RR 2d at 1086 n. 11, and that, as with program production companies, a showing is needed that interests in such entities undermine the maximizing of available program services and viewpoints and the preventing of any undue concentration of economic power. *Id.* We also note the Commission's recent decision in *Caldwell Broadcasting Corp.* , FCC 86-245, released May 15, 1986, *granting rev. in part,* 100 FCC 2d 115, 57 RR 2d 1039 (Rev. Bd. 1985), which emphasized that where only the ownership of a small medium of expression is involved, such as a weekly newspaper, factors such as low circulation and relevance to the community of the proposed station may destroy any diversification significance.

27. Taking into account the Commission's emerging policies in this area and the record evidence summarized above, we conclude that Multicultural should be assessed only a slight diversification demerit for its three New York area broadcast/newspaper interests. This judgment is based primarily on the full-time, commercially sponsored nature of Mr. Liu's Newark SCA service. But for the fact that it requires special receiving equipment, the service is essentially undistinguishable from a full-fledged Newark FM broadcast station to its listeners. Such a station located, as here, in the proposed city of license would normally yield a substantial demerit for its 100% owner. *See Brownfield Broadcasting Corp.* , 93 FCC 2d 1197, 53 RR 2d 1175 (Rev. Bd. 1983, *rev. denied* , FCC 84-11 (Comm'n 1984). We have reduced that demerit to "slight;' to balance the size of Mr. Liu's overall area audience (50,000 to 100,000) against the fact that only 357 Chinese persons live in Newark (1980 population - 329,248) and that special SCA receivers are needed to hear the programs. As we held in *Big Bend Broadcasters,* 96 FCC 2d 166, 168 (Rev. Bd. 1983), *rev. denied* , FCC 84-645 (Comm'n 1984), the pervasive impact of a full-time radio station must be deemed more significant than a weekly-newspaper (or a monthly magazine, the medium at issue in *Caldwell Broadcasting, Corp., supra).* Moreover, we must take cognizance of the fact that Newark is only 10 miles west of New York City (I.D., Fdgs., para. 5), where the bulk of Mr. Liu's listeners reside. Thus, his SCA operation is clearly a significant, "service area" media interest, unlike the *Caldwell* monthly magazine. Finally, we cannot completely ignore the media concentration implications of the totality of Mr. Liu's FM (SCA), television (ITFS), and daily newspaper interests for the New York area's sizeable Chinese population. As to Comserv's non-voting stockholders, we affirm the ALJ's refusal to assess any diversification demerit. Cornwell and Beck clearly do not hold "significant managerial positions" at WNYC or Beck-Ross. *Policy Statement, supra,* 1 FCC 2d at 394 n. 5, 5 RR 2d at 1908 n. 5.

28. *Integration of Ownership and Management* . Under the ownership integration comparative criterion, the ALJ excluded Omnilingual and Caprice from extensive consideration because their credited quantitative integration was so much below that of the other applicants. Exceptions have been filed concerning those judgments as well as the proper quantitative and qualitative credit for the remaining contenders. We will examine the arguments *seriatim* .

29. *Las Americas* . Las Americas is a New Jersey corporation with six stockholders, all of whom are proposed to be integrated full-time at the station. The ALJ awarded Las Americas 100% full-time quantitative integration credit, S.I.D., Concls., para. 30, but Caprice, Comserv, and Multicultural have excepted. They assert variously that credit for 63% stockholder and proposed station manager Luis Raul Bernard should be diminished or disallowed because he will not be available full-time, will be subservient to the proposed general manager, and has indicated a willingness to sell some of his stock to other integrated principals; that 10% stockholder and proposed general manager Luis M. Rodriguez will not have a true day-to-day managerial role at the station because of Mr. Bernard's dominance; that 8% stockholder and proposed business manager Thomas Mendez will not move from his present residence in Puerto Rico; and that 6% stockholder and proposed public affairs director Georgina Falu will not give up her present position as a two-day per week associate professor of accounting in order to assume her station role. The ALJ denied all of these challenges, as do we. We summarily reject the attacks on the effectuation intentions of Mendez and Falu as lacking any record support and being completely speculative. *See Central Texas Broadcasting Co., Ltd.,* 90 FCC 2d 583, 51 RR 2d 1478 (Rev. Bd. 1982); *rev. denied* , FCC 83-415 (Comm'n 1983), *aff'd mem. sub nom. Blake-Potash Corp. v. FCC,* No. 83-2112 (D.C. Cir. April 26, 1985). As to Bernard and Rodriguez, the exceptions concerning their impotence are mutually inconsistent, thereby revealing the strong role that each person will play at the proposed station. We attach no significance *per se* to the fact that Mr. Bernard is the president and largest stockholder of Las Americas but is not the station's chief operating officer (general manager). *See Voce Intersectario Verdad Americaz Inc.,* 100 FCC 2d 1607, 58 RR 2d 445 (Rev. Bd.), *recon. denied* , 102 FCC 2d 465, 59 RR 2d 44 (Rev. Bd. 1985). As in *Voce,* we are not surprised or troubled to see the principal with the most past broadcast experience (Rodriguez) serving as general manager, and, as outlined in the ALJ's findings (paras. 109-117), we are satisfied that Messrs. Bernard and Rodriguez will have sufficient separate and joint managerial/policy responsibilities to justify full credit for both of their roles. *See Minority Broadcasters of East St. Louis, Inc.* , 99 FCC 2d 264, 56 RR 2d 275 -(Rev. Bd. 1984), *rev. denied,,* 57 RR 2d 1390 (Comm'n 1985), *aff'd by judgment sub nom. Spectrum Telecommunications Corp.* v. *FCC* , No. 85-1249 (D.C. Cir. April 9, 1986 (full- credit given for managerial duties with some overlapping responsibilities). Finally, we believe that Bernard's intention to transfer his Otoao Record Company responsibilities to his wife is an effective trimming of his non- broadcast commitments, which cannot reasonably be understood as saddling her with a "second full-time job," and that Bernard's willingness to sell some of his shares to other integrated stockholders is non-decisional here in terms of quantitative credit and, in any event, is too amorphous to have any immediate or reasonably foreseeable impact on the Las Americas integration proposal. *See Washington's Christian TV Outreach Inc.* , 99 FCC 2d 395, 414, 56 RR 2d 1539 1555 Rev. Bd. 198-4-), *rev. denied* , 59 RR 2d 787 (Comm'n 1985).

30. *Caprice* . Caprice is a New York corporation which proposes to integrate four of its five stockholders (97%) full-time and the remaining owner (3%) part-time. In this instance, the ALJ completely rejected, as unlikely to be effectuated, the proposed integration of 88% owner Arlen Kantarian and reduced Dr. Alex S. Edwards' 3% integration proposal as director of community relations from full-time to part-time. Thus, Caprice netted only 6% full-time and 6% part-time quantitative credit, which al-

lowed the ALJ to remove it from further comparative consideration as a clear dead horse. S.I.D., Concls., paras. 30-31. Caprice's three pages of exceptions on this critical point do nothing to resurrect its corpse.

31. Caprice feebly urges that the sole (and inadequate) reason for rejection of Kantarian's integration proposal was the fact that he delegated to Caprice's counsel "much of the responsibility" for prosecution of Caprice's application. Caprice February 8, 1985 Exceptions at 5. However, this characterization drastically understates the legal basis for the ALJ's action, the extent of Kantarian's abdication of "interest and influence" in the Caprice application, *KIST Corp.* , 102 FCC 2d 288, 291, 58 RR 2d 1483, 1485 (1985), *aff'd mem . sub nom. United American Telecasters, Inc.* v. *FCC* , No. 85-1663 (D.C. Cir. Oct. 15, 1986), and the dominant role that Jack Chadrjian, Kantarian's stepfather and Caprice's unintegrated Vice-President and local counsel, has played in his stead. In almost identical language, Caprice's final Integration Proposal, filed March 6, 1984, in response to Order Prior to Prehearing Conference, FCC 84M-908, released February 22, 1984, and its direct case Exhibit 4, exchanged on July 13, 1984 and received into evidence on July 23, 1984 (Tr. 165), recite that: "As General Manager of the station, [Kantarian] will have ultimate responsibility for all facets of station operation, including programming, sales, financial, etc. All other employees will be under his supervision and direction." (Exh. 4, p. 1.) Yet the May 16, 1984 prehearing deposition testimony of Caprice's stockholders (all except Edwards) and the June 28, 1984 deposition testimony of Jack Chadrjian, largely reiterated at the August 14, 1984 hearing session (Tr. 886-964), present a devastatingly different picture.[6] Unlike the "nominal" role that Caprice would like to project, the record reveals that: Chadrjian suggested filing for the Newark facilities to Kantarian (Tr. 904); Chadrjian brought Caprice's five stockholders together to form the applicant group (Chadrjian dep. at 22); Kantarian asked Chadrjian to handle the application process "totally," along with Washington communications counsel (*id* .; Tr. 905); Chadrjian and Washington counsel prepared Caprice's programming and EEO proposals, and Chadrjian prepared all of Caprice's corporate documents, but Kantarian was only consulted on the former and did not even see the corporate documents - (Kantarian dep. at 40, 41; Chadrjian dep. at 23); Chadrjian paid all of Caprice's expenses until June 1984, subject to reimbursement (Chadrjian dep. at 11-12), and none of the stockholders made any financial contributions to Caprice until that time (*id.);* Kantarian remains uncertain whether each Caprice stockholder (including himself) is entitled to a single vote, or whether voting power is proportionate to ownership interest (Kantarian dep. at 39-40; Tr. 930-31); Chadrjian appointed himself as Caprice's Vice-President and gave himself a power of attorney for FCC application purposes, which actions were later ratified by the stockholders without any formal meeting or vote (Tr. 925-26; Chadrjian dep. at g-11), but Kantarian was unaware that Chadrjian was Vice-President until May 16, 1984 (Tr. 925), while Chadrjian believes that he became Vice-President "sometime after 1982, before 1984" (Chadrjian dep. at 5); and Chadrjian envisions continuing as Caprice's Vice President and legal counsel after its Newark application is granted (Chadrjian dep. at 19-20).

32. In denying Comserv's motion to dismiss Caprice's application (see note 6, *supra)* by Memorandum Opinion and Order, FCC 84M-3869, released September 10, 1984, the ALJ, at n. 1, formally credited Chadrjian's deposition testimony that his vice-presidency conferred no ownership status, no voting rights, and not even the right to preside at meetings in Kandarian's absence. Or, as Chadrjian put it (dep. at 7, 9): "[I]t's a routine practice in our office . . . for the purposes of . . . signing [corporate documents] . . . I have no vote, no right to perform any functions other than administration functions as an officer of the corporation." However, we note that, although Caprice's bylaws describe the duties of its officers, there is no such description of an emasculated vice-president, and Chadrjian conceded that the bylaws had never been so amended. *Id* . at 9. Thus, in light of the ample record evidence set forth above that Vice-President Chadrjian has had, and continues to have,[7] primary responsibility for the organization, corporate affairs, and prosecution of Caprice's application and that President and proposed General Manager Kantarian has remained quite uninformed and uninvolved, we disregard Chadrjian's self-serving false modesty and hold that his dominance and Kantarian's subservience and indifference shatter any confidence we might otherwise have that Kandarian is willing or able to effectuate his 32-word "full-service" integration proposal. [8] This rejection is consistent with the ALJ's ultimate conclusion, which we affirm, that no integration credit is appropriate for Kantarian's 88% ownership interest.[9] *See KIST Corp., supra; Utah Television Associates Ltd. Partnership,* 102 FCC 2d 1470, 1478-79, 59 RR 2d 493, 498 (Rev. Bd. 1985)(no credit where principal did not meaningfully participate as decisionmaker and did not truly comprehend his integrated role); *cf. Louisiana Super Comm. Ltd. Partnership,* 102 FCC 2d 1293, 59 RR 2d 761 (Rev. Bd. 1985)(integration credit diminished where dominant party's future passivity and integrated party's future activity questioned). As to Dr. Edwards, we affirm the reduction of his integration credit to parttime in conformity with his own testimony concerning the nature and weekly duration of his proposed management/policy responsibilities.

33. *Comserv* . The ALJ fully credited Comserv's 99.5% full-time and 0.5% part-time integration proposal, based on the undertakings of 49.75% voting stockholder Cecil R. Forster, Jr. to serve as general manager (40 hours per week), 49.75% voting stockholder Sonya Suarez to serve as station manager (40 hours per week), and 0.5% voting stockholder Charles J. Hamilton, Jr. to serve as business and legal affairs manager (20 hours per week). The ALJ noted but gave no weight to the fact that Hamilton also holds 33.2% of Comserv,s non-voting stock and that Stuart J. Beck and W. Don Cornwell each hold 33.4% of Comserv's non-voting stock (see paragraphs 25 and 27, *supra)* but are not included in Comserv's integration proposal. S.I.D., Fdgs., paras. 63, 85-101, and Concls., para. 30. However, the ALJ did not address the contentions of Las Americas, Caprice, and Multicultural that Comserv's current integration proposal is the type of B cut-off date reconfiguration sham that the Board completely disallowed in *Hispanic Owners, Inc* ., 99 FCC 2d 1180, 57 RR 2d 695 (Rev. Bd. 1985), *rev. denied* , FCC 86-316 (Comm'n 1986). The exceptors argue that Comserv deserves, at most, *"de jure"* integration credit of 66-2/3% full-time and 33-1/3% part-time, or *"de facto"* integration credit of 40% full-time and 20% part-time to take account of the corporate realities reflected in the record evidence, citing *Henderson Broadcasting Co* ., 63 FCC 2d 419, 39 RR 2d 1099 (Rev. Bd. 1977). For the

reasons which follow, we hold that Comserv deserves only 40% full-time and 20% part-time quantitative integration credit.

34. As originally filed, Comserv's application involved a New Jersey corporation with five 20% voting stockholders (the same individuals described in paragraph 33, *supra),* each of whom had a 20% equity interest. When Comserv's integration proposal was amended at the B cut-off date, each owner retained a 20% equity interest, but Beck and Cornwell, the two non- integrated owners, completely lost their voting stock, and the voting stock of Hamilton, the part-time integrated owner, was reduced from 20% to 0.5%. Id. The net result was that by introducing non-voting stock into its corporate organization (consistent with its articles of incorporation, Comserv Exh. 7), Comserv converted a meager 40% full-time/20% part-time integration proposal into a formidable 99.5% full-time/0.5% part-time one. While this last-minute corporate legerdemain is not prohibited *per se* (such amendments as of right are not treated as comparative upgrading) , it "ineluctably raise[s] the question of whether the purported . . . arrangement . . . should be given full efficacy . . . or whether [it] should be regarded as a formalistic legal ploy signifying no *de facto* control change . . . . " *Chester Associates* , 102 FCC 2d 93, 96 (Rev. Bd. 1985).

35. To test the *bona fides* of Comserv's proposal, Comserv urges that the critical question is whether its non-voting owners (Beck and Cornwell) have any "control" or "decision-making authority" over the applicant. Comserv May 5, 1986 Reply Br. at 15, 16. We disagree. Indeed, elsewhere Comserv itself previously attempted to depict Beck and Cornwell as enjoying "purely passive investor status." Comserv March 7, 1985 Reply Br. at 3. This characterization, if true, comes much closer to the mark. For, as long ago as *Anax Broadcasting, Inc.,* 87 FCC 2d 483, 488, 49 RR 2d 1589, 1594 (1981), the Commission made clear that the hallmark of limited partners [or non-voting stockholders] is their status as "passive investors". More recently, in *Cleveland Television Corp.,* 91 FCC 2d 1129, 1132, 52 RR 2d 581, 584 (Rev. Bd. 1982), *rev. denied,* FCC 83-235 (Comm'n 1983), *aff'd,* 732 F.2d 962 (D.C. Cir. 1984), the Board held that preferred stock ownership would not be taken as an adequate insulator against corporate overreaching without other "limitations [to] further reduce the likelihood that the . . . principals will, *influence* [the applicant's] operation" [and evidence that preferred stockholders] "are *isolated* from corporate management" (emphasis added). Additionally, in *KIST, Inc., supra,* 102 FCC 2d at 291, 58 RR 2d at 1485, the Commission ratified a suspect integration proposal after concluding only that a principal had "a legitimate interest and influence" in the applicant partnership, not "control." Finally, in *Signal Ministries, Inc.,* 60 RR 2d 1700 (Rev. Bd. 1986), we refused to credit a corporate organization structure revised at the B cut-off date, where "the participation . . . of the non-voting stockholders is so thoroughly intertwined with the participation of the voting stockholders . . . . " *Accord , Hispanic Owners, Inc ., supra* (allegedly non- integrated principals participated in the affairs of the applicant corporation). Taken together, this evolving body of precedent makes it abundantly clear that the Commission will not give credence to revised integration proposals where parties who were previously heavily involved in an application continue to play *any role whatsoever* while at the same time posing as non-voting passive investors. Such arrangements simply stretch legal fictions (and the Commission's credulity) beyond reasonable limits.

36. Reviewing the hearing testimony cited by the exceptors (Tr. 1009-18, 1079-80, 1128), we conclude that it adequately demonstrates that, since the B cut-off date, Beck and Cornwell have continued to play influential participatory roles in Comserv that are wholly inconsistent with their supposedly "passive" status. These activities include attending voting stockholder meetings and offering legal and financial advice. *Id* . The fact that Beck and Cornwell have been actively involved in the Comserv enterprise since its inception (Tr. 1054, 1075-76, 1138) precludes us from treating their continued involvement as innocuous and not *pari materia* with their past participation and influence. In fact, the utter absurdity of Comserv's sham is manifest in its vain effort to explain how, on the one hand, Hamilton (both a voting *and* a non-voting stockholder), Forster, and Suarez "control the affairs of Comserv," Comserv May 5, 1986 Reply Br. at 17, while, on the other hand, "[t]he non-voting shareholders enjoy certain protections which compensate for their lack of voting rights and reflect their purely passive investor status" (*id.* at 14). Such "Janus-like" arrangements cannot be credited for ownership integration purposes. *See Cotton Broadcasting Co.,* 60 RR 2d 982, 984 (Rev. Bd. 1986)(sole limited partner receives no credit as integrated general partner). Thus, we are obliged to roll back Comserv's integration proposal to its pre-B cut-off status, at which time it sought to integrate 20% stockholder Forster and Suarez full-time and 20% stockholder Hamilton part-time. This proposal we accept and credit, although Hamilton's 20-hour per week undertaking is borderline at best. *See* Tr. 1070, 1121, 1124- 25.

37. *Multicultural* . Arthur Liu is president and sole stockholder of Multicultural, a New Jersey corporation. The ALJ fully credited his 100% full-time quantitative proposal. S.I.D., Concls., para. 30. Only Comserv challenges this credit, saying that Liu cannot fully effectuate his proposal because he does not intend to divest himself of his present businesses and the record does not completely describe how these other businesses will be run. We will deny this exception. Commission precedent does not require divestiture of existing business interests in order to meet an integration commitment, only that actual day-to-day involvement be eliminated or curtailed to the extent necessary to meet that commitment. *See Central Texas Broadcasting Co., Ltd., supra,* 90 FCC 2d at 586, 51 RR 2d at 1481. In the instant case, Liu has undertaken to "withdraw entirely," "cease to devote any time," and "terminate all such activity in the event of a grant" with respect to the three businesses to which he currently devotes approximately 40 hours per week. Multicultural Exh. 1 at 4, 5; Tr. 1177, 1178, 1183, 1184. In addition, Mr. Liu testified that his wife would take over the management of one business (Tr. 1183) and the corporate board of directors would appoint or hire someone to manage a second one (Tr. 1184). These undertakings and arrangements are sufficient to provide a reasonable likelihood that Liu will fully carry out his integration duties, absent rebuttal evidence which Comserv has not supplied. Speculation and surmise are no substitute. *See Warmac Communications* Inc., 103 FCC 2d 1218 (Rev. Bd. 1975), *rev . dismissed,* FCC 86- 443 (Comm'n 1986) .

38. *Omnilingual* . In its proffered direct evidence, Omnilingual, a corporation, claimed 95% full-time and 5% part-time quantitative integration credit for a proposal in which all nine of its stockholders would be involved in day-to-day management. However, at hearing Omnilingual only presented three witnesses to support 60% full-time credit, which the ALJ granted; he then struck the biographical and integration statements of the remaining six principals because they failed to appear for cross-examination. S.I.D., Fdgs., paras. 68, 147, and n. 20, and Concls., para. 30. Omnilingual excepts to this decimation of its integration proposal as an abuse of discretion and a denial of due process, and requests the reinstatement of its exhibits and their full consideration at a remand hearing. An ALJ has broad discretion to control the course of a hearing, such as by requiring the presence of sponsoring witnesses, whether or not they are called for cross-examination. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 834 n. 5, 50 RR 2d 1117, 1122 n. 5 (Rev. Bd. 1981) . Cross-examination of proposed integrated principals is *de rigueur* in comparative broadcast proceedings, and the record indicates that the missing witnesses would all have been cross-examined if they had been present (Tr. 1254-1256). At the commencement of hearing testimony on Monday, August 13, 1984, ten applicants remained in the proceeding and 40 witnesses (including Omnilingual's nine) were scheduled to appear for cross-examination. By Tuesday, the cross-examination of witnesses appeared to be taking much less time than anticipated, and Omnilingual concedes that its counsel advised its witnesses "to travel to Washington immediately as it seemed possible that they might be called . . . as early as Wednesday . . . . "Omnilingual April 7, 1986 Br. at 7. However, only three of its nine managed to negotiate the hardly arduous 250-mile journey from the New York area to Washington by 4:15 p.m. on Wednesday, when they were called to testify. Or, in other words, nine applicants succeeded in getting 31 witnesses to Washington on time, but the tenth (Omnilingual) was only one-third successful, even with some 24 hours' notice. Under these circumstances, and noting that there was no further hearing business to be transacted other than to cross-examine Omnilingual's tardy witnesses (the hearing ended on Wednesday, Tr. 1264), we cannot hold that the ALJ abused his discretion or denied due process by refusing to continue the hearing for another day. Omnilingual's unexplained sluggardness denied itself its day in court, and its exception, although timely, will likewise be denied. *See Hillebrand Broadcasting, Inc., supra* (ALJ's efficient and expeditious conduct of hearing especially appropriate in multiparty proceedings).

39. In sum, as to quantitative integration, we conclude that Las Americas and Multicultural are the only remaining applicants with 100% credit and that the proposals of Caprice, Comserv, and Omnilingual are too quantitatively remote to require further comparative consideration. *See New Continental Broadcasting Co., supra.* Turning to the qualitative enhancement factors, Las Americas deserves a slight local residence/previous civic participation preference over Multicultural because it has 92% present service area residence, 100% future Newark residence, and 85% extensive service area civic participation, compared to 100% present service area residence, no proposed move to Newark, and minimal service area civic participation for Multicultural. Las Americas Exhs. 2-7; Multicultural Exh. 1; *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 52 RR 2d 1063 (1982), *aff'd sub nom. West Michigan Broadcasting Co* . v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied* , 105 S.Ct. 1392 (U.S. 1985)(enhancement credit given for service area residence and civic participation). On the other hand, Multicultural warrants a slight past broadcast experience preference over Las Americas because its enhancement derives from 100% experienced ownership versus 86% for Las Americas; however, this preference has less relative weight than Las Americas' slight residence/civic preference because the broadcast experience enhancement factor is of only "minor significance," *Policy Statement, supra*, 1 FCC 2d at 396, 5 RR 2d at 1910, and has "less significance" than local residence, *Radio Jonesboro, Inc* ., 100 FCC 2d 941, 948, 57 RR 2d 1564, 1569 (1985). This disparity in Las Americas' favor is not offset by the fact that only 73% of Las Americas' voting power is concentrated in its top two broadcast management slots versus 100% for Multicultural. *Cf. Minority Broadcasters of East St. Louis, Inc., supra*, 99 FCC 2d at 271, 56 RR 2d at 282 (proposal qualitatively strengthened' where 46% owner will serve as general manager while opponent does not propose any principal for this position). Thus, on balance, we conclude that Las Americas is entitled to a slight overall ownership integration preference over Multicultural, having prevailed on qualitative enhancement preferences while being in equipoise on quantitative integration credit. *See Radio Jonesboro, Inc., supra.*

40. *Miscellaneous Matters* . On April 7, 1986, Jersey City Broadcasting Company (Jersey City) filed a motion for reinstatement and consideration of its former application in this proceeding, which it voluntarily dismissed pursuant to a joint settlement agreement approved by the ALJ in Memorandum Opinion and Order, FCC 84M-3915, released September 13, 1984. While Jersey City maintains that its purpose is not to upset the settlement but rather to preserve a Section 307(b) choice now that Antonin & Garcia, the last Jersey City applicant, has been disqualified, its motion will nevertheless be denied. Jersey City lost its standing in this proceeding two years ago, and, at this appellate stage, neither the Commission's rules nor case precedent mandate the preservation of a Section 307(b) choice. *See Bison City Television 49 Limited Partnership*, 51 RR 2d 307 (1982); Section 73.352;5(b) of the Rules, 47 CFR 73.3525(b). On May 5, 1986, The Committee to Preserve Multi-Ethnic and Multi-Lingual Programming filed an amicus brief (and motion for leave to file) in support of Omnilingual's request that this proceeding be remanded to determine whether there is a special need for the type of foreign language programming that it proposes to offer. Omnilingual's exception to the ALJ's refusal to add this issue in Memorandum Opinion and Order, FCC 84M-2227, released May 10, 1984, has become non-decisional and will not be reached because of its otherwise dismal comparative posture (see paragraph 38, *supra),* which would not allow victory even if the requested issue were decided in its favor. *Cf. Communications Properties, Inc.*, FCC 83-320, released July 7, 1983 (applicant would lose on comparative issue even if it received substantial preference for past broadcast record). Hence, the Committee's motion to file will be dismissed as moot. Similarly, because of Comserv's already-adjudicated comparative shortcomings (see paragraphs 33-36, *supra),* Las Americas' July 11, 1986 petition to reopen the record and Caprice's July 22, 1986 motion to enlarge, which further challenge Comserv's credentials, have been rendered non-decisional and will not be reached.

41. Finally, we turn to Comserv's exception that the ALJ erred in not enlarging the issues against Las Americas to explore the alleged failure of its 63% owner and proposed station manager, Luis Bernard, to pay state taxes for Otoao Record Company (a separate business interest of his) for the years 1978-1985 and the implications of this failure in terms of false financial certification, lack of candor, and Las Americas' basic financial qualifications (Memorandum Opinion and Order, FCC 85M-4188, released October 29, 1985). In rejecting Comserv's motion for lack of a *prima facie* case, *id* . at para. 11, the ALJ held (in light of Bernard's responsive pleadings): "The most that can be said about Bernard is that he has had a running battle with the New York State taxing authorities about the amount of business and sales tax [Otoao] owes, and how to pay them. That's no big deal." We affirm the ALJ's action based on the information then before him. However, on October 21, 1986, three weeks after the adoption of our Decision herein but before this lengthy text could be published, Comserv filed a further motion to enlarge in which it renews its request for the above issues, supported by new allegations that Otoao's New York State tax problems actually derive from Otoao's inability to remain current in its payments on two U.S. Small Business Administration loans, totaling $150,000, obtained in 1980 and 1984, and that these undisclosed financial difficulties are fatally adverse to Las Americas' qualifications to be a licensee. Noting that this proceeding was originally designated for hearing almost three years ago (February 13, 1984), the Board is loathe to postpone any further the issuance of a Decision in this case, which addresses a plethora of important matters unrelated to Comserv's latest motion, pending completion of the pleading cycle on the new motion. Hence, we will treat Comserv's October 21 motion as being in the nature of a petition for reconsideration of our grant herein to Las Americas, and will rule on that petition and all subsequent related pleadings in a later Order.

42. *Final Comparative Evaluation* . Having considered all decisionally significant exceptions, the Board has awarded a slight media diversification preference and a slight ownership integration preference to Las Americas and no preferences to any other applicant. We therefore declare that grant of Las Americas' application will best serve the public interest, convenience, and necessity.

43. Accordingly, IT IS ORDERED, That the petition for leave to amend filed by Omnilingual Broadcasting, Inc. on January 28, 1985 IS GRANTED, and its amendment IS ACCEPTED;

44. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Caprice Broadcasting Group, Inc. on February 1, 1985 IS GRANTED, and its amendment IS ACCEPTED for reporting purposes only;

45. IT IS FURTHER ORDERED, That the requests by Multicultural Broadcasting, Inc. on May 3 and June 28, 1985 for leave to file information statements ARE GRANTED, and the statements ARE ACCEPTED,;

46. IT IS FURTHER ORDERED, That the motion to correct transcript of oral argument filed by Frances Lawrence Antonin and Mary Garcia d/b/a Antonin and Garcia on June 3, 1985 IS GRANTED;

47. IT IS FURTHER ORDERED, That the motion for reinstatement and consideration of application filed by Jersey City Broadcasting Company on April 7, 1986 IS DENIED,;

48. IT IS FURTHER ORDERED, That the motion for leave to file an amicus curiae brief, filed by The Committee to Preserve Multi-Ethnic and Multi-Lingual Programming on May 5, 1986, IS DISMISSED as moot, and its simultaneously filed brief, as supplemented on July 14, 1986, IS REJECTED;

49. IT IS FURTHER ORDERED, That the petition to reopen the record, filed by Las Americas Communications, Inc. on July 11, 1986, and the motion to enlarge issues, filed by Caprice Broadcasting Group, Inc. on July 22, 1986, ARE DISMISSED as moot;

50. IT IS FURTHER ORDERED, That the motion to enlarge issues filed by Comserv Broadcast Group, Inc. on October 21, 1986 IS DEFERRED for consideration in a subsequent Order; and

51. IT IS FURTHER ORDERED, That the application of Las Americas Communications, Inc. (File No. BPH-821105AR) for a construction permit to establish a new FM broadcast station at Newark, New Jersey, IS GRANTED, and the applications of Frances Lawrence Antonin and Mary Garcia d/b/a Antonin and Garcia (File No. BPH-821108AQ), Caprice Broadcasting Group, Inc. (File No. BPH-821108AS), Comserv Broadcast Group, Inc. (File No. BPH-821108AV), Multicultural Broadcasting, Inc. (File No. BPH-821108BE), and Omnilingual Broadcasting, Inc. (File No. BPH-821108BK) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jerold L. Jacobs
Member, Review Board

FOOTNOTES

[1] The listed appearances include attorneys who appeared in Phase 1 and/or Phase 2 of this proceeding.

[2] This application and the applicant's exceptions to the Supplemental Initial Decision reviewed herein have already been dismissed by the Review Board pursuant to a settlement agreement with Comserv Broadcast Group, Inc. FCC 86R-45, released July 15, 1986. Hence, they will not be considered in this Decision.

[3] DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness reads in pertinent part as follows:

> "(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, ... "

[4] Although Garcia's admitted violations of Title 26, U.S.C. may not be adjudicated felonies, the Commission's Character Policy Statement wisely and deliberately states that other similar conduct could be equally disqualifying:.

> "The Commission acknowledges that there may be circumstances in which an applicant has engaged in nonbroadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation . . . Such misconduct might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee, and might be a matter of Commission concern even prior to adjudication by another body. The Commission cannot presently contemplate the manner in which circumstances might arise, and stresses that such considerations would come into play only with regard to a specific application involving specific misconduct."

102 FCC 2d at 1205 n. 60. We have no doubt that Garcia's prosecution of a commercial broadcast application in which she sought a very valuable privilege of public trust from the United States government, while at the same time (1) failing to abide by her elementary duties to file income tax returns with that government and (2) claiming to be fully financially qualified, though in arrears to the federal government for more than $11,000, would "shock the conscience" of any rational observer and "evoke almost universal disapprobation." Moreover:

> "The Commission recognizes that there may be circumstances in which an applicant has engaged in repeated, willful violation of law amounting to a flagrant disregard for complying with the law. Such adjudicated misconduct might, of its own nature, provide sufficient evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee. In the rare instances where the Commission is confronted with such record, consideration should be given to the circumstances surrounding the violations. In this regard, we believe that not only must there be a pattern of adjudicated violations, but the types of violations must reflect a significant departure from established legal authority. Moreover, the applicant must have either actual knowledge that the conduct constitutes a clear violation of existing law or the nature of the violation itself must give rise to an irrefutable inference that the applicant knew it was violating the law. In making these determinations it may be appropriate to consider whether the violation resulted from an incorrect legal interpretation or whether the violation represented a knowing decision to ignore legal authority."

Id. at n. 61. Whereas Garcia's repeated federal offenses may not be "adjudicated," they are plainly conceded, thus obviating the need for agency adjudication. Garcia claims not any "incorrect legal interpretation"; she knew her failure to file was in blatant violation of federal law; her offenses were "repeated . . . violation[s] of law amounting to a flagrant disregard for complying with the law", and her actions plainly "provide sufficient evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee.,

[5] A final word is appropriate here concerning the elusive Mr. Donald Lewis, whom the Commission thought was being ousted from licenseeship of the subject facilities in 1980 but has now emerged as the sole funding source therefor under Antonin & Garcia's banner. See paragraph 8, *supra* . All of the other applicants have excepted to the ALJ's refusal to add a real party in interest issue to challenge the *bona fides* of Lewis' supposed arm's length relationship. Memorandum Opinions and Orders, FCC 85M-4144, released October 24, 1985, and FCC 85M-4361, released November 6, 1985. In light of our review of the record, we share the exceptors' skepticism and would remand this case on the requested issue but for Antonin & Garcia's clear disqualification on *other grounds*. *See Las Misiones de Bejar TV Co.* , 93 FCC 2d 191, 53 RR 2d 119 (Rev. Bd. 1983), *rev. denied*, 56 RR 2d 1481 (Comm'n 1984)(separate real party issue needed). We would also remand on a financial misrepresentation issue, also denied by the ALJ in FCC 85M-4144, *supra*, to explore more thoroughly the disqualifying effect of Antonin & Garcia s initial pretense in Phase 1 of this proceeding that Antonin and Garcia, rather than Donald Lewis (whose name was never mentioned in Phase 1), were going to be the sole funding sources for their application on a fifty-fifty basis (Tr. 849).

[6] The depositions entered the record as exhibits in support of Comserv's August 2, 1984 Motion to Dismiss Caprice's application because of Jack Chadrjian's alleged dual participation in the applications of Caprice and Global Broadcasting Group, Inc., the interim operator of the deleted facilities of WHBI(FM).

[7] Pursuant to Section 1.65 of the Rules, we will accept Caprice's February 1, 1985 application amendment for reporting purposes only, which advises the Commission that Chadrjian resigned as Caprice's Vice-President on December 31, 1984. Presumably he continues to be its legal counsel, but, in any event, his departure comes too late to improve Caprice's comparative status.

[8] Our examination of this sparse offering and related hearing testimony also fails to reveal any undertaking by Kantarian to terminate his present full- time employment. This lacuna provides an independent basis to obliterate Kantarian's putative 40-hour per week broadcast commitment, since the Board will not credit 80-hour work weeks. *See Berryville Broadcasting Co.*, 70 FCC 2d 1, 44 RR 2d 1325 (Rev. Bd. 1978)(70-hour work week not credited).

[9] Under these circumstances, we need not reach the exceptions by Comserv and Multicultural to the ALJ's failure to dismiss Caprice's application. Before such a dismissal could occur, further hearing would be necessary to elucidate fully the factual and legal implications of Chadrjian's apparent ubiquity. See note 6. *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-423

Petition for Modification of Section 68.318(b) of the Commission's Rules	RM-5363

Notice of Proposed Rulemaking

Adopted October 23, 1986; Released: November 26, 1986*

By the Commission:

1. Before the Commission is a petition for rulemaking, RM-5363, filed by several Bell Operating Companies (BOCs) requesting that the Commission initiate a rulemaking proceeding proposing to amend Section 68.318(b) of the rules, 47 C.F.R. § 68.318(b), to eliminate the requirement that local exchange carriers provide DC power for certain customer premises equipment functions used in conjunction with 1.544 Mbps digital services.[1] Comments have been filed by the NYNEX Telephone Companies (NYNEX), Verilink Corporation (Verilink), GTE Corporation (GTE), Independent Data Communications Manufacturers Association, Inc. (IDCMA), American Telephone and Telegraph Company (AT&T), and Contintental Telecom, Inc. (Continental). For the reasons stated below, we grant the petition and issue this notice of proposed rulemaking.

Background

2. Part 68 of the Commission's rules, 47 C.F.R. Part 68, provides the technical and procedural standards under which direct electrical connection of customer-provided telephone equipment, systems and protective apparatus may be made to the nationwide telephone network. Compliance with those standards assures equipment manufacturers and consumers that their equipment is connectable to the network, and assures telephone companies that such connection will not cause harm to the network. In *Amendment of Part 68 of the Commission's Rules Concerning Connection of Equipment, Systems and Protective Apparatus to the Telephone Network* (*Second Report and Order*), CC Docket 81-216, 49 Fed. Reg. 48,714 (December 14, 1984), *reconsideration* , 50 Fed. Reg. 48,203 (November 22, 1985), the Commission amended Part 68 to create standards for registration and customer provision and interconnection of network channel terminating equipment (NCTE) used in conjunction with subrate and 1.544 Mbps digital transmission services.[2] Section 68.318(b) (1) adopted at that time requires that NCTE contain identifiable circuitry that assures a continuity of output signal. Under that section it is required that the NCTE assure either (1) that the output signal meet a specified minimum pulse density (12.5%), which normally would be accomplished by insertion of additional pulses when pulse density falls too low, or (2) transmit of one of three specified keep alive signals when pulse density falls too low. Section 68.318(b) provides that the power to operate pulse density and keep alive circuitry "shall come from the line." The purpose of these line-powered pulse density and keep alive functions is to prevent oscillation of regenerators in the carrier's transmission facilities which can occur in the absence of a signal or a signal of sufficient pulse density.[3] Such oscillation can cause interference to adjacent channels of communications and was identified as a sufficient potential network harm to warrant adoption of Section 68.318(b). *Second Report and Order*, para. 17-18.

Contentions

3. The BOCs state that early versions of repeaters used with 1.544 Mbps transmission services were subject to self-oscillation in the absence of input signals. Since 1972, however, the BOCs have employed line repeaters using integrated components which are essentially immune from oscillation caused by an absence of signal, they state. The BOCs contend that older style repeaters are no longer being installed and do not generally exist in the local loop plant. Any remaining problems of oscillation have been avoided, they say, by other means such as carrier-provided keep alive signals. The immunity from harm of contemporary facilities has been demonstrated, argue the BOCs, by the fact that under the rules adopted for interconnection of NCTE customers can disconnect NCTE without prior consent of the telephone carrier. This disconnection, they say, has taken place without network harm. Accordingly, the BOCs urge, there is no reason for the current rule requiring carriers to provide line power to operate pulse density and keep alive functions. Similarly, they conclude, there is no reason to retain the requirement under Section 68.318(b) that NCTE contain keep alive capability as a condition of Part 68 registration.

4. The BOCs further point out that the existing requirements are compatible only with metallic transmission media, *ie.*, fiber optical cable cannot deliver electric current. Therefore, they argue, the present requirements discourage the use of fiber optics. They state that local exchange carriers (LECs) are using fiber optic transmission media to provide 1.544 Mbps service but that this has resulted in the necessity for two interfaces for this service – one where metallic circuits are employed and another where fiber optics are used.[4] They claim that the absence of a single interface creates customer inconvenience, inhibits network inprovements, and may interfere with the achievement of Integrated Services Digital Networks (ISDN) and comparably efficient interconnection. Industry groups meeting under the auspices of the Exchange Carriers Standards Association (ECSA) are working on achieving a single interface that will accommodate both technologies and have reached a tentative agreement on such an interface description, the BOCs state. However, they contend that it is necessary for the standard to reflect either a "wet", *i.e.*, powered, or "dry", *i.e.*, unpowered, interface. The general consensus reached is for a dry interface, they state, but that this will necessitate amendment of Section 68.318(b).

5. The BOCs also contend that the existing Section 68.318(b) creates a potential electrical hazard. They state that carrier line powering arrangements are designed to accommodate the length of the line and can be as high as 260 volts dc and is almost always 130 volts dc or more.

This voltage level at the customer interface can pose a considerable risk to untrained customers, state the BOCs, and that policies permitting customer provision of network access wiring will increase that exposure. *See e.g., Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket 79-105, FCC 86-63, released February 24, 1986; *Amendment of Part 68* , 97 FCC 2d 527 (1984). Based on these considerations, the BOCs propose revision of Section 68.318(b) to eliminate any requirement that carriers provide line power on 1.544 Mbps service. (No other service would be affected by this proposal.) It is additionally proposed that keep alive capability be eliminated as a condition of NCTE registration. However, the BOCs would retain the requirement that NCTE contain a pulse density maintenance capability.

6. Commenters generally support the BOC petition. GTE states that it supports the petition because it reflects the consensus achieved at the ECSA T-1 subcommittee meeting in Juanuary, 1986. It recommends, however, that a reasonable transition period should be provided -- eighteen months -- to allow manufacturers to change their equipment to accommodate the new interface. GTE also urges that carriers not be foreclosed from providing a sealing current.[5] Continental emphasizes that there is a developing consensus among industry groups to adopt a dry interface under Section 68.318(b) because fiber optics will be the major transmission medium for ISDN. IDCMA states that it supports the principle of an unpowered interface, but that it cannot offer its unqualified support at this time because of uncertainties as to the means by which the BOCs intend to implement their proposal. Achievement of an unpowered interface can be accomplished consistent with Commission policy permitting direct connection of customer premises equipment, states IDCMA, but it would also be possible to implement such an interface by including on the network side of the interface functions which the Commission has determined to be CPE.[6] It further points out that the BOC proposal does not explain the effect of the proposed rule on CPE designed in accordance with the existing rule.

7. For its part, AT&T endorses the objective of a uniform customer-carrier interface for 1.544 Mbps, and it would not object to such an unpowered interface. However, it believes that the keep alive function should be continued as a requirement of NCTE registration under Part 68.[7] It claims that local carriers and AT&T rely on keep alive signals to monitor circuit status and to activate trouble alarms. AT&T also urges that a three year transition period be allowed for manufacturers to continue to market terminal equipment meeting the existing rule. AT&T urges that the Commission clarify that permitting a dry interface would not obviate the carriers' obligation to provide sealing current and that it would only apply to 1.544 Mbps service. It proposes rule amendments that would permit an unpowered interface, require the customer to provide power for keep alive, and require the customer to notify the telephone companies when power for keep alive and minimum pulse density functions is removed, or when the NCTE is disconnected.

8. Verilink opposes the BOCs' proposal to eliminate the requirement that dc power be provided by the carriers on metallic lines used for 1.544 MBps service and that NCTE contain keep alive functions as a condition of registration. Verilink states that NCTE performs a number of functions such as signal regeneration, loop-back, and keep alive signals which must be provided in order to avoid disruption to adjacent transmission lines and services. The use of line power to operate these functions ensures that they will be available even if the customer experiences an ac power failure. Verilink contends that line power also has the function of providing a sealing current and should therefore be retained as a requirement for 1.544 Mbps service under Part 68. Verilink further contends that even if petitioners were to eliminate from their networks all repeaters capable of oscillation, other carriers not joining in the petition have not or will not do so in the near future, and their transmission systems will remain vulnerable to insufficient pulse density in signals originating in petitioners' networks. Thus, Verilink concludes, line power must continue to be provided by petitioners in order to power vital pulse density and keep alive functions. Verilink points out that AT&T's PUB 62411, Accunet T1.5 Service Description and Interface Specifications (1985), continues to require that critical functions performed by NCTE receive power at all times, even in the event of power failure. PUB 62411, § 4.4.1. This technical reference also states that "AT&T will remove the circuit from operation to ensure that harm does not occur on the network." *Id* . § 5.4.1. Verilink is also unpersuaded by contentions by carriers that keep alive signals can be provided by carriers within the network. It states that this could only be useful if the NCTE contains a loopback state, but that the Part 68 rules for NCTE adopted by the Commission do not require any loopback capability. Petitioners also exaggerate the amount of industry support for the proposal, states Verilink, in that the T1C1.2 Digital Interface Working Group has not reached a consensus or formally adopted any position. Finally, Verilink questions the electrical hazard associated with T1 circuits in that installation of complex or system wiring must be performed or supervised by trained personnel. See 47 C.F.R. § 68.215. Verilink states, however, that it would not object to a clarification of Section 68.318(b) that optical fiber circuits be exempt from line power requirements, but, line power should still be provided on metallic circuits, it maintains.

Discussion

9. The line power requirement for 1.544 Mbps service under Section 68.318(b) would not appear to serve the purpose for which it was designed as repeaters using integrated circuits immune to oscillation are now employed extensively in the network. The carriers' contention that line powered keep alive and pulse density requirements are not necessary to assure adequate protection are entitled to significant weight. While Verilink contends that line powering of such functions is essential for network protection, these contentions are unsupported and do not warrant denial of the petition for rulemaking. Accordingly, we will propose at this time elimination of the requirement in Section 68.318(b) that carriers provide line power to operate NCTE functions for 1.544 Mbps digital service.

10. Similarly, insofar as line repeaters may essentially be immune from oscillation there would appear to be no reason to require that NCTE contain keep alive capability. Therefore, we are also proposing at this time elimination of the keep alive requirement of Section 68.318(b). It may also be unnecessary to retain minimum pulse density capability as a condition of NCTE registration. The BOCs, while alleging generally that minimum pulse density will

protect against network harms other than oscillation of line repeaters, have failed to identify what harms they seek to prevent. Moreover, they have also indicated that minimum pulse density is more closely related to network performance rather than harm to the network. Petition, p. 4. The Commission has previously indicated that network compatibilty or performance standards are not normally adequate to justify Part 68 equipment registration standards, and should be addressed by industry groups rather than government regulations. *Cf . Interconnection Order,* 94 F.C.C.2d 5 (1983). Accordingly, we are additionally proposing elimination of the present minimum pulse density requirement. Parties should substantiate in technical detail requests that these regulatory requirements be retained. Comments from ECSA and other industry groups would be especially useful.

11. Several parties have raised the issue of the effect of the elimination of line power on the operation of installed NCTE. However, it is unclear from the existing comments the extent to which elimination of the present requirement would make obsolete currently connected or inventoried NCTE. The present rule contemplates that line power will be provided for keep alive and pulse density functions. There is no requirement that other functions performed by NCTE be line powered. However, some registered NCTE may in fact use line power for other functions than keep alive or pulse density maintenance. In addition, insofar as carriers or other parties are able to justify retention of keep alive and/or minimum pulse density capabilties in NCTE as a condition of registration, appropriate transition periods, or delays in elimination of the line power requirement, may be appropriate to permit customers and manufacturers to provide alternative power sources for these functions. Commenting parties should explain to what extent NCTE may presently be using line power for functions other than keep alive and pulse density maintenance. Comments should additionally explain to what extent NCTE already has the capability or option of using premises power, and to the extent that it does not, what retrofitting or additional equipment would be necessary to use premises power, and the costs and time necessary to provide such retrofitting. This information will enable the Commission to fashion an appropriate transition period for elimination of line power on 1.544 Mbps service if necessary. Carriers and other parties are additionally requested to relate any proposed transition period to the Commission's purposes under Part 68, *e.g.* Section 68.110(b), 47 C.F.R. § 68.110(b)[8]

12. The carriers have contended that the present requirement for line power inhibits improvements in the network, and may prevent achievement of ISDN and comparably efficient interconnection. The Commission believes that these factors may be relevant in its final determination on whether to retain or eliminate any present requirement under Section 68.318(b). The Commission requests that comments explore these issues.

Ex Parte Presentations

13. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and oral arguments) between a person outside the Commission and a Commissioner or a decision-making member of the Comission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments peviously filed in the proceeding must prepare a written summary of that presentation which must be served on the Secretary for inclusion in the public file, with a copy to the Commission official(s) receiving the presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally,* Section 1.1231 of the Commission's rules, 47 C.F.R. § 1.1231. In reaching its decision , the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

Regulatory Flexibility Act Initial Analysis

14. *Reason for Action.* The Commission is initiating this rulemaking in order to determine whether Section 68.318(b) of the rules should be eliminated.

15. *Objectives.* The objective of this notice of proposed rulemaking is initiate a rulemaking and seek comment on the Commission's proposal to eliminate the requirements of Section 68.318(b) of the rules.

16. *Legal Basis.* The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*

17. *Description, potential impact and number of small entities affected.* The Commission's proposal to eliminate the requirements of Section 68.318(b) will primarily affect telephone carriers and terminal equipment manufacturers. Under the Commission's proposal telephone carriers would not be obligated to provide line power on 1.544 Mbps service, and terminal equipment manufacturers would not be required to provide in network channel terminating eequipment keep alive or minimum pulse density capability as a condition of Part 68 registration.

18. *Recording, recordkeeping and other compliance requirements*: None.

19. *Federal rules which overlap, duplicate or conflict with the Commission's proposal:* None.

20. *Any significant alternatives minimizing impact on small entities and consistent with stated objective:* None.

21. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4, 201-205, 215, 220, 313, 309(e)-(h) and 412 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 220, 313, 309(e)-(h), and 412, and 5 U.S.C. § 553, That NOTICE IS GIVEN of proposed rule changes to Part 68, 47 C.F.R. Part 68, as discussed above.

22. Interested parties may file comments on or before January 5, 1987, and reply comments on or before January 20, 1987.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] The BOCs filing are the Bell Telephone Company of Pennsylvania, the Chesapeake and Potomac Telephone Company, the Diamond State Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Nevada Bell, New Jersey Bell Telephone Company, the Ohio Bell Telephone Company, Pacific Bell, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, and Wisconsin Bell, Inc.

[2] Subrate digital services are those operating at speeds less than 1.544 Mbps. These are 2.4 kbps, 4.8 kbps, 9.6 kbps, and 56 kbps services.

[3] Generally, the term regenerator refers to a device that samples an incoming data stream and transmits a reconstructed data stream. The term repeater, on the other hand, may refer to a device that performs signal detection and amplification functions on an analog signal or to a device that serves as a regenerator. We use the terms regenerator and repeater interchangeably.

[4] The BOCs have not explained how the present requirement for line power is met where fiber optics are employed.

[5] A continuous electrical current on a metallic circuit retards corrosion. This is referred to as a sealing current.

[6] While it did not specify which functions it was concerned about, presumably IDCMA refers to signal regneration, keep alive, pulse density and loopback testing. *See* Interconnection Order, 94 F.C.C.2d 5 (1983).

[7] AT&T contends that it is not necessary for the Commission to require that NCTE contain back-up power, *e.g.* batteries, for the keep alive functions.

[8] Section 68.110(b) provides: *Changes in telephone company facilities, equipment, operations or procedures.* The telephone company may make changes in its communications facilities, equipment, operations or procedures, where such action is reasonably required in the operation of its business and is not inconsistent with the rules and regulations of this Part. If such changes can be reasonably expected to render any customers terminal equipment incompatible with telephone company communications facilities, or require modification or alteration of such terminal equipment, or otherwise materially affects its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service.

* Note: This document was originally intended for release on November 7, 1986 and was published at 1 FCC Rcd 804. The document appearing in this Book is to be considered the correct version.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	
Corporate Ownership Reporting and Disclosure of Broadcast Licensees.	Docket No. 20521
Amendment of Sections 73.35, 73.240 73.636 and 76.501 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Stations and Broadcast Stations.	Docket No. 20548
Amendment of Sections 73. 35, 73.240, 73.636 and 76.501 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Stations and CATV Systems.	BC Docket No. 78-239
Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities.	MM Docket No. 83-46 RM-3653 RM-3695 RM-4045

MEMORANDUM OPINION AND ORDER

Adopted: September 26,1986; Released: November 28, 1986

By the Commission: Commissioner Dennis not participating.

1. Before the Commission are the requests for reconsideration or clarification of the *Attribution Reconsideration Order* [1] adopted in the above-captioned proceedings filed by Sovereign Ventures (Sovereign) and Miller and Fields, P.C. (Miller). After careful review of these requests, we are persuaded to revise in one respect the guidelines contained in that Order clarifying the type of insulation necessary to permit the holder of a limited partnership interest to qualify for an exemption from attribution. Specifically, we determine that it is not inconsistent with the insulation criteria for an unattributed limited partner to possess the power to remove a general partner for cause as long as the partnership agreement specifies that a neutral arbiter, rather than the limited partner, will make any factual determinations regarding the liability of a general partner to removal. We decline, however, to make any other changes to our attribution rules requested by the parties. [2]

INTRODUCTION

2. Through its attribution rules, [3] the Commission determines whether or not the holder of an ownership or positional interest directly or indirectly in a licensee possesses a sufficient degree of influence or control to justify limitation by the media multiple ownership rules. [4] In the *Attribution Order*, the Commission, after undertaking a comprehensive reexamination of its policies, made a number of significant revisions to the attribution rules. One of these revisions involved the exemption from attribution for limited partners who did not actively participate in partnership affairs. [5] Specifically, the Commission determined to exclude from attribution limited partnership interests satisfying two conditions. First, the licensee was required to certify that the limited partnership conformed in all material respects to the Revised Uniform Limited Partnership Act of 1976 (RULPA). [6] Second, any limited partner who qualified for an exemption was barred from becoming materially involved in the management or operation of the partnership. [7]

3. On reconsideration, the Commission again altered the attribution rules relating to limited partnership interests. Determining that its regulatory objectives would be satisfied by relying exclusively upon the "no material involvement" standard, the Commission eliminated the threshold criterion that the licensee certify that the limited partnership was in compliance with the provisions of RULPA. The Commission also provided clarification, in the form of specific guidelines, as to the type of insulation which would satisfy the requirement that an exempt limited partner not be materially involved in partnership affairs. For example, the Commission stated that the limited partnership agreement should specify that an exempt limited partner not act as an employee, agent or independent contractor of the limited partnership if his or her functions relate to the media enterprises of the company. [8] In addition, the Commission determined that an exempt limited partner could vote on the admission of new general partners only if the existing general partners possessed the right to veto any such admissions. [9] The Commission also restricted the powers of an exempt limited partner to remove a general partner to situations in which the general partner either is subject to the bankruptcy proceedings specified in Section 402 (4)-(5) of the RULPA or is adjudicated incompetent. [10] Further, the Commission stated that "the partnership agreement should restrict exempt limited partners from communicating with the licensee or the general partner on matters pertaining to the day-to-day operations of its business." [11] With the exception of functioning as a surety or lender, the Commission also specified that an exempt limited partner should not perform any services to the limited partnership relating, in any material respect, to its media activities. [12]

4. None of the parties before us have challenged our determination that certain types of limited partnership interests should be attributed whereas other limited partnership interests should qualify for an exemption from attribution. Rather, the parties seek three further revisions or clarifications to the criteria utilized in assessing whether or not a specific limited partnership interest should be attributed. First, criticizing the scope of the insulation criteria as they relate to the "removal" power of exempt limited partners, Sovereign requests the Commission to permit an exempt limited partner to remove a general partner for cause. Second, Sovereign asks the

Commission to "clarify" that all limited partners who hold less than five percent interest in the partnership shall qualify for an exemption from attribution without regard to whether or not that partner is materially involved in the management and operation of the partnership. Third, Miller requests the Commission to "clarify" that the provision of legal representation and counsel relating to the licensing and operation of broadcasting facilities is outside the scope of the insulation guideline barring exempt limited partners from providing services materially relating to the media activities of the partnership.

POSITION OF THE PARTIES AND DISCUSSION OF THE ISSUES

5. *Removal of General Partners for Cause.* As noted above, Sovereign requests the Commission to specify that the right of a limited partner to remove a general partner for cause will not disqualify that partner from obtaining an exemption from attribution. The petitioner asserts that the power of a limited partner to remove a general partner for cause – which it describes as malfeasance, criminal conduct, or wanton or willful neglect [13] – is a basic right that is "essential to the integrity of the investment." [14] Indeed, the petitioner, an investment banker engaged in the syndication of limited partnership interests, states that it has never offered limited partnership interests without this protection. [15] Noting that "[m]any partnership agreements provide that disputes over 'cause' are subject to binding arbitration," [16] Sovereign asserts further that the retention of this right is consistent with the articulated policies underlying the attribution rules because the power of removal for cause does not convey the ability to participate in the managerial or operational affairs of the partnership.

6. Upon further reflection, we agree with the petitioner that it is appropriate for us to expand the scope of the power of an exempt limited partner to remove a general partner. Specifically, we believe that an exempt limited partner should not be prohibited from removing a general partner upon a finding by an independent party that the general partner has engaged in malfeasance, criminal conduct or wanton or willful neglect. [17] We find that adoption of this modification furthers the objectives underlying our attribution rules. In determining to limit the attribution of limited partnership interests to those interests which convey the ability to influence or control the media-related affairs of the partnership, we reasoned that:

> the exemption of properly insulated limited partnership interests . . . not only facilitates the infusion of capital into broadcasting enterprises but, in addition, it eliminates unnecessary and potentially costly regulation while still maintaining the integrity of the diversity rationale underlying the multiple ownership rules. [18]

While a limited partner empowered to remove a general partner without restriction might substantially impact partnership affairs by influencing the actions of the general partner, the ability to remove a general partner only for cause does not convey comparable influence to the limited partner, particularly if the finding of culpability must be independently determined. [19] As a consequence, we find that the modification of our guideline adopted herein is consistent with our objective both to restrict attribution to influential ownership interests and to eliminate unneeded regulatory constraints. In addition, the petitioner has convinced us that the power to remove a general partner for cause is a right which many limited partners reasonably perceive to be necessary to adequately protect their investment. [20] We believe, therefore, that this modification will also assure that our attribution rules do not unnecessarily inhibit investment in broadcast facilities. [21]

7. *Applicability of the Five Percent Benchmark to Limited Partnership Interests.* In its Petition, Sovereign also urges the Commission to "clarify" that the interest of any limited partner who possesses less than five percent equity interest in a licensee is not attributable whether or not that partner complies with the insulation criteria set forth in the *Attribution Reconsideration Order*. The petitioner alleges that the Commission's staff, prior to the adoption of the *Attribution Reconsideration Order*, had determined that all limited partnership interests under five percent were not attributable. While acknowledging that "[t]he attribution rules did not explicitly provide for such a 5% threshold," [22] the petitioner contends that this exclusion "flowed logically" [23] from the five percent benchmark established in the *Attribution Order* for common stock interests. The petitioner asserts that the Commission, on reconsideration, did "not address the applicability of the 5% rule to limited partnerships, . . ." [24] and "the Commission's intent in this regard is therefore unclear." [25] It asserts further that there is no justification for the Commission to "abandon" this exclusion. Contending that common stockholders possess greater rights than do limited partners under the provisions of RULPA, the petitioner argues that the policies underlying adoption of a five percent benchmark for stock interests apply with equal force to limited partnership interests. [26] It also states that the "clarification" which it seeks "will provide certainty and predictability to both broadcast and cable operators and to the financial community." [27]

8. We disagree. It is clear from the express language of our attribution rules that all interests of limited partners who do not satisfy the "no material involvement" standard are attributable, irrespective of the amount of equity that the partner may hold. [28] While the petitioner correctly notes that corporate voting stock interests of five percent or less are exempt from attribution, the scope of the regulation that codifies the five percent ownership benchmark is unambiguously restricted to corporate, voting stock interests. [29] Neither the attribution rules nor the orders revising these rules lend any support for the existence of a blanket exemption for all limited partnership interests under five percent. [30] Therefore, we do not believe that there is any ambiguity in our rules concerning the five percent ownership benchmark which warrants clarification.

9. Further, it would be inappropriate, as a matter of policy, for the Commission to extend the scope of the five percent attribution threshold to encompass limited partnership interests. We believe that the rationale underlying the adoption of a five percent ownership benchmark for voting stock interests does not support the extention of a comparable provision to limited partnership interests. Contrary to the contention of the petitioner, the rights of limited partners are not necessarily more restrictive than the rights of common stockholders. The partners in a limited partnership, through contractual arrangements,

largely have the power themselves to determine the rights of the limited partners. [31] As a consequence, certain limited partners may be insulated from material involvement in partnership affairs whereas other limited partners may actually have the power to participate in the control the company. [32] Indeed, as we recognized in the *Attribution Reconsideration Order*, "our experience in assessing the ownership structures of broadcast licensees reflects that the role of limited partners varies significantly in different broadcast entities." [33]

10. Critically, unlike the powers of a voting stockholder, the powers of a limited partner are not necessarily dependent upon the extent of his or her equity holdings. A limited partner with a four percent equity holding, by virtue of expansive powers contained in the partnership agreement, may have significant influence over the media-related activities of the firm. In contrast, a limited partner possessing a ninety-nine percent equity interest who is governed by restrictive provisions of a partnership agreement may be a purely passive investor.

11. In addition, we disagree with the petitioner's implicit suggestion that the Commission's adoption of its proposed five percent threshold is necessary to prevent the widespread and burdensome attribution of limited partnership interests under five percent. As noted above, under the existing attribution rules, passive investors holding limited partnership interests, by satisfying the "no material involvement" standard, are exempt from attribution irrespective of their equity interest in the partnership. [34] Because limited partners holding equity interests under five percent typically are purely passive investors, the vast majority of these partners already qualify for an exemption under the existing attribution criteria. The adoption of the petitoner's proposal, therefore, is not necessary to exclude these partners from attribution. While the current standard does not exempt limited partnership interests under five percent that convey the ability to materially influence the media-related activities of the partnership, we believe that such interests are properly attributed.

12. In sum, we decline to extend the scope of the five percent attribution benchmark to encompass limited partnership interests. Because the equity interest of a limited partner bears no necessary relation to his or her ability to influence the affairs of the partnership, we believe that the adoption of an equity-based criterion to determine the status of a limited partnership interest under the attribution rules would be inappropriate. Instead, we shall continue to utilize the "no material involvement" standard, by itself, in assessing whether or not a specific limited partnership interest should be accorded an exemption from attribution.

13. *"Legal Services" Exemption.* Miller is a law firm which represents a number of applicants for broadcast construction permits. It states that one of its attorneys received limited partnership interests in certain clients of the firm in exchange for his legal services. Asserting that "[i]t was the desire of all concerned that the limited partner attorney not have an attributable interest, for either multiple ownership or comparative purposes," [35] Miller expresses concern that the attribution of the attorney's limited partnership interest could disadvantage the limited partnership in a comparative hearing.

14. In its Motion, Miller requests the Commission to "clarify" that a limited partner who provides legal services to the limited partnership relating to the licensing and operation of a broadcast station can nonetheless obtain an exemption from attribution under the "no material involvement" standard. Miller recognizes that the Commission, in the *Attribution Reconsideration Order*, specified that limited partners qualifying for an exemption from attribution should neither communicate with the licensee on matters relating to its day-to-day operations nor perform services to the limited partnership materially relating to its media activities. [36] While acknowledging that "[i]t is possible to construe [these provisions] to include the giving of legal advice," [37] the movant contends that the Commission's intent in this regard is unclear. Miller argues that the only way in which many applicants are able to obtain legal counsel is by providing the attorney with a direct equity interest in the applicant. As a consequence, it contends that "a holding that an attorney's limited partnership interest would be considered attributable for comparative purposes would limit the applicant's choice of counsel and may even make it impossible to obtain adequate legal representation." [38]

15. We disagree. Apart from two specified exceptions wholly unrelated to the provision of legal services, the *Attribution Reconsideration Order* unambiguously provides that the partnership agreement should bar an exempt limited partner from providing "any" services which materially relate to the media activities of the partnership. [39] The petitioner's assertion that the scope of this provision does not encompass legal services, therefore, is at odds with the plain language of our *Attribution Reconsideration Order*. Moreover, in our view, it would be difficult to envision legal services that are more directly related to the media activities of the partnership than those concerning the licensing and operation of broadcasting entities. Consequently, we decline to adopt the movant's interpretation of this provision.

16. Moreover, we are unpersuaded that there is any policy reason which would justify an exemption for the legal services described in the motion. A partner whose contribution to the partnership is in the form of personal services and expertise rather than in the form of a financial investment is the antithesis of a passive investor. Indeed, it is virtually inevitable that such a partner will become actively involved in partnership affairs. We also reject the movant's unsupported assertion that a special exception for legal services in our attribution rules is necessary to assure the availability of legal representation for applicants for a construction permit. As applied to legal services, the guideline at most indicates that the equity interest of limited partner who provides legal representation and counsel to the partnership is attributable. [40] It does not colorably bar an applicant from retaining an attorney nor does it in any way limit the manner in which that attorney is compensated. As a consequence, we decline to adopt the "clarification" of the *Attribution Reconsideration Order* advanced by the movant.

ORDERING CLAUSES AND DISPOSITION

17. As prescribed by the Regulatory Flexibility Act, [41] we have prepared a final regulatory flexibility analysis (FRFA) which outlines the effect of the modification to the attribution guideline on small entities. The FRFA is contained in Appendix C.

18. The requirements contained in this *Memorandum Opinion and Order* have been analyzed with respect to the Paperwork Reduction Act of 1980 [42] and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

19. Accordingly, IT IS ORDERED, That Parts 73 and 76 of the Commission's Rules and Regulations are amended effective January 5, 1986, as set forth in the attached Appendices A and B.

20. IT IS FURTHER ORDERED, That the "Petition for Further Reconsideration or Clarification" filed by Sovereign Ventures IS GRANTED to the extent described herein and IS OTHERWISE DENIED.

21. IT IS FURTHER ORDERED, That the "Motion for Clarification or for Declaratory Ruling" filed by Miller and Fields IS DENIED.

22. Authority for the actions taken herein is contained in Sections 4(i), 4(j), 303 and 405 of the Communications Act of 1934, as amended. [43]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX A

47 C.F.R. Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. §§154, 303.

2. 47 C.F.R. §73.3555 NOTE 2 is amended by revising paragraph (g)(2) to read as follows:

§73.3555 Multiple ownership.

* * * * *

NOTE 2: * * *

* * * *

(g)(2) In order for a licensee or system to make the certification set forth in paragraph (a)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. The criteria which would assure adequate insulation for purposes of this certification are described in the *Memorandum Opinion and Order* in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985) as modified on reconsideration in *Memorandum Opinion and Order* in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners in the management or operation of the media-related businesses of the partnership.

* * * * *

3. 47 C.F.R. §73.3615 is amended by revising paragraph (a) to read as follows:

§73.3615 Ownership reports.

(a) With the exception of sole proprietorships and partnerships composed entirely of natural persons, each licensee of a commercial AM, FM, or TV broadcast station shall file an Ownership Report on FCC Form 323 once a year, on the anniversary of the date that its renewal application is required to be filed. Licensees owning multiple stations with different anniversary dates need file only one Report per year on the anniversary of their choice, provided that their Reports are not more than one year apart. A licensee with a current and unamended Report on file at the Commission may certify that it has reviewed its current Report and that it is accurate, in lieu of filing a new Report. Ownership Reports shall provide the following information as of a date not more than 60 days prior to the filing of the Report:

* * *

* * * * *

APPENDIX B

47 C.F.R. Part 76 is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. §§154, 303.

2. 47 C.F.R. §76.501(a) NOTE 2 is amended by revising paragraph (g)(2) to read as follows:

§76.501 Cross-ownership.

* * * * *

NOTE 2: * * *

* * * * *

(g)(2) In order for a licensee or system to make the certification set forth in paragraph (g)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. The criteria which would assure adequate insulation for purposes of this certification are described in the *Memorandum Opinion and Order* in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985) as modified on reconsideration in *Memorandum Opinion and Order* in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners in the management or operation of the media-related businesses of the partnership.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

1. *Need for and Objective of the Rule.* Earlier in this proceeding, the Commission had determined, as a matter of policy, to limit the attribution of limited partnership interests to those interests which convey the ability to influence or control the media related activities of the partnership. In order to implement this policy, the Commission adopted guidelines designed to clarify the specific type of insulation which would qualify the holder of a limited partnership interests for an exemption from attribution. In the attached *Memorandum Opinion and Order,* the Commission decided that it could safely relax the guideline addressing the power of an exempt limited partner to remove a general partner for cause under certain conditions. Specifically, where the basis of removal is specified and a finding of liability to removal is independently determined, the Commission found that the power of a limited partner to remove a general partner for cause would not convey sufficient influence to the limited partner to warrant the attribution of his or her ownership interest.

2. *Issues Raised in Response to the Initial Regulatory Flexibility Analysis.* No party to this proceeding raised any issue specifically in response to the Initial Regulatory Flexibility Analysis contained in the *Notice of Proposed Rulemaking,* the Final Regulatory Flexibility Analysis contained in the *Report and Order,* or the Final Regulatory Flexibility Analysis contained in the *Memorandum Opinion and Order.*

3. *Significant Alternatives Considered and Rejected.* The Commission considered the retention of the attribution guideline which provided that a limited partner who is exempt from attribution could possess the power to remove a general partner only in situations involving bankruptcy and adjudicated incompetency. In rejecting this alternative, however, the Commission reasoned that this guideline was overly restrictive and did not properly reflect the policy objectives underlying the attribution standards. Specifically, it determined that an expansion of the power of removal as adopted in the attached *Memorandum Opinion and Order* would more accurately limit attribution to truly influential ownership interests, eliminate unwarranted regulation, and assure that the attribution standards do not operate to unnecessarily inhibit investment in broadcasting facilities.

4. *Public Dissemination of this Document.* The attached *Memorandum Opinion and Order,* which includes this Final Regulatory Flexibility Analysis, is publicly available. This document can be reviewed at the Federal Communications Commission, Office of Congressional and Public Affairs, Room 202, 1919 M St. N.W., Washington D.C. 20554. Members of the public may obtain copies of this document from International Transcription Services, Suite 140, 2100 M St. N.W., Washington D.C., 20037.

FOOTNOTES

[1] *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities,* Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), 50 Fed. Reg. 27438 (July 3, 1985) *[Attribution Reconsideration Order].*

[2] In the *Attribution Order,* the Commission, inter alia, exempted licensees who were sole proprietorships and "50/50" partnerships from the obligation to file annual ownership reports. *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities,* Report and Order in MM Docket No. 83-46, 97 FCC 2d 997, 1032 (1984) *[Attribution Order].* On reconsideration, the Commission modified this exception by excluding from the scope of the annual filing requirement all partnerships consisting entirely of natural persons. *Attribution Reconsideration Order, supra* note 1 at 62. Inadvertently, the applicable provisions of our regulations were not properly amended to reflect this change to the reporting obligations. On our own motion, therefore, we shall revise the language of Section 73.3615 of our rules (47 C.F.R. §73.3615 (1985)) to correct this oversight.

[3] The attribution rules are codified in the notes to the multiple ownership rules. 47 C.F.R. §§73.3555, 76.501 (1985).

[4] *See generally Attribution Reconsideration Order, supra* note 1 at ¶2.

[5] *Attribution Order,* 97 FCC 2d at 1022-23.

[6] REVISED UNIFORM LIMITED PARTNERSHIP ACT, 6 U.P.A. 216-91, §§101-1105 (1976) [RULPA].

[7] Attribution Order, 97 FCC 2d at 1022-23.

[8] Attribution Reconsideration Order, supra note 1 at ¶48.

[9] *Id.* at ¶49.

[10] *Id.*

[11] *Id.* at ¶48.

[12] at 50.

[13] "Petition for Further Reconsideration or Clarification," filed by Sovereign Ventures (August 5, 1985) at 10 [Sovereign Petition].

[14] *Id.* , Affidavit of Bruce Seabrook at ¶5.

[15] *Id.*

[16] *Id.* at 11.

[17] While we have used petitioner's descriptive phrase "wanton or willful neglect" here, we do not intend thereby to incorporate fine distinctions of negligence law. Rather, we intend only that the class of conduct warranting discharge of a general partner be so removed from the ordinary as to require recourse by prudent investors to an express right of removal.

[18] *Id.* at ¶27. *See Attribution Order,* 97 FCC 2d at 1022-23.

[19] This is consistent with the existing guidelines contained in the *Attribution Reconsideration* Order which provide that an exempt limited partner can retain the power to remove a general partner in certain limited circumstances involving bankruptcy and adjudicated incompetency, both independently determined. *Attribution Reconsideration Order, supra* note 1 at ¶49.

[20] In this regard, Sovereign has represented that many in the industry, including the petitioner, "would be reluctant or unwilling to offer limited partnership interests to its customers if the partnership agreement did not contain [the right of removal for cause]." Sovereign Petition, *supra* note 13 at 11.

[21] As the scope of circumstances or conduct that may render a general partner liable to removal is broadened, it becomes increasingly important that actual determinations of removal be independently reached. While we do not intend to restrict the range of alternative mechanisms that might satisfy this independence requirement, we do emphasize that any abuse in this area would be of substantial concern to us. Although we do not intend to generally supervise cases of this type, we would be disposed to take appropriate action, if warranted, in the context of an individual case.

[22] *Id.* at 12.

[23] *Id.*

[24] *Id.* at 13.

[25] *Id.* at 3.

[26] The petitioner states that persons holding limited partnership interests of less than five percent lack both the desire and the ability to participate in the control of the partnership. *Id.* at 13-14.

[27] *Id.* at 13.

[28] The attribution rules specify that:

> A limited partnership interest *shall be attributed* to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

47 C.F.R. §73.3555, Note 2(g)(1) (1985) (emphasis added).

[29] Note 2(a) of Section 73.3555 of the Commission's rules, specifies that:

> Except as otherwise provided herein, *partnership* and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper will be cognizable

47 C.F.R. §73.3555, Note 2(a) (1985) (emphasis added). It is clear from the express language of this rule that the five percent ownership benchmark is restricted in scope to voting stock interests held in corporate licensees. It is equally clear that noncorporate ownership interests, including partnership interests, are not subject to this five percent benchmark. Moreover, while Note 2(g)(1) specifically exempts interests held by limited partnerships who are not materially involved in the management or operation of the media-related activities of the partnership (*see supra* note 26), neither Note 2(g)(1) nor any other attribution provision expressly or tacitly establishes a five percent benchmark for limited partnership interests.

[30] As noted above, the petitioner argues that our staff, between the date of the original *Attribution Order* and our decision on reconsideration, had interpreted the five percent benchmark to encompass limited partnership interests. The petitioner, however, provides no support for this assertion, either by reference to a staff ruling or otherwise. Even if we assume, arguendo, the existence of this staff "practice," we note that the ownership benchmark adopted in the original *Attribution Order* and unrevised on reconsideration is expressly limited in scope to voting stock interests. *See id.* Moreover, while the Commission did make alterations to the attribution rules governing limited partnership interests on reconsideration, these rule changes were wholly unrelated to the five percent ownership benchmark. Any undocumented staff "practice" prior to our latest revisions of the attribution rules purporting to extend the ownership benchmark to limited partnership interests, therefore, clearly would have been ineffective in altering the scope of unambiguous regulations adopted by the Commission.

[31] The legislative history of the RULPA reflects that the powers that may be accorded to limited partners vary widely. The National Conference of Commissioners on Uniform State Laws, at the time that it promulgated RULPA, stated that "[t]he draftsman of a limited partnership agreement has a degree of flexibility in defining the relations among the partners that is not available in the corporate form." RULPA, *supra* note 6, 6 U.L.A. at 189 (Commissioners' Prefatory Note). Similarly, we stated in the *Attribution Reconsideration Order* that:

> a limited partnership is a distinct form of business association with unique characteristics that justify the differential treatment of limited partnership interests for attribution purposes. Perhaps the most critical distinction between a limited partnership interest and a voting shareholder's interest is the broad flexibility given to the partners of a limited partnership to determine the powers of a limited partner.

Attribution Reconsideration Order, supra note 1 at ¶29.

[32] *Id.* at ¶34. Indeed, as we recognized in the *Attribution Reconsideration Order,* the provisions of RULPA

> permit a limited partner to retain limited liability and to participate "in the control of the business" as long as this participation "is not substantially the same as the exercise of the powers of a general partner" and creditors have no actual knowledge of this control.

Id. at ¶41, quoting RULPA, *supra* note 6 at §303(a).

[33] *Id.* at ¶34, n.48.

[34] Characterizing the insulating criteria established in the *Attribution Reconsideration Order* as "well reasoned . . . helpful and sensible" (Sovereign Petition, *supra* note 13 at 2), the petitioner does not contend that the "no material involvement" standard is unduly burdensome. To the contrary, with modification of the insulation guidelines to permit an unattributed limited partner to remove a general partner for cause -- a change adopted by this *Memorandum Opinion and Order* -- the petitioner affirmatively states that the use of a partnership agreement conforming to the insulation criteria would be "a simple matter." *Id.* at 9.

[35] "Motion for Clarification or for Declaratory Ruling," filed by Miller and Fields (June 28, 1985) at 2.

[36] *Id.* at 2.

[37] *Id.*

[38] *Id.* at 3.

[39] In the *Attribution Reconsideration Order*, the Commission specified that:

> with the exception of permitting a limited partner to make loans to, or act as surety for the business, the [partnership] agreement should . . . bar the exempt limited partner from performing any services to the limited partnership materially relating to its media activities.

Attribution Reconsideration Order, supra note 1 at ¶50.

[40] With respect to the movant's contentions concerning the comparative process, we note that the nature and extent of the preferences which may be accorded in comparative hearings are beyond the scope of this rulemaking.

[41] See 5 U.S.C. §604 (1982).

[42] Federal Paperwork Reduction Act, 44 U.S.C. §§3501-3520 (1984 Supp.).

[43] 47 U.S.C. §§154(i)-(j), 303, 405 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-404

In the Matter of

Amendment of Part 90
Subparts M and S RM-5153
of the Commission's
Rules.

NOTICE OF PROPOSED RULE MAKING

Adopted : October 16, 1986; Released: November 28, 1986

By the Commission: Commissioner Quello dissenting in part and issuing a statement.

I. Introduction

1. We initiate this proceeding to merge Subpart M and Subpart S of Part 90 the Commission's rules. These rules provide that on September 1, 1987, Subpart M will be eliminated and that all the channels governed by that subpart will fall under the purview of Subpart S. Because of the differences between Subpart M and Subpart S, and to make a reasoned transition from using two subparts to one subpart, we are considering changes to Subpart S that will establish a consistent approach to the regulation of the 800 MHz spectrum.[1] Our proposed changes are directed primarily to the Specialized Mobile Radio (SMR) service.[2]

2. We are taking this opportunity to propose greater flexibility and enhanced service options for SMR licensees and end users. In light of our regulatory experience and changes in the SMR industry, we are proposing to eliminate loading standards as they apply to SMR systems; to apply the same application procedures to all channels available to SMR applicants; to apply waiting list procedures to all SMR system applications; to relax our prohibition against partial assignments; and to modify our eligibility requirements for SMR end users to make this service available to a wider segment of the American public. Finally, we are confirming our policy on for-profit operation in the 800 MHz band.

II. Background

a) Private Land Mobile Radio Service at 800 MHz

3. Several proceedings led to the creation of the current regulatory structure for private land mobile service in the 800 MHz band. We believe it would be helpful to summarize these proceedings and the development of the two subparts that govern private systems in the 800 MHz band before discussing our proposed amendments. This will place the changes into historical perspective and provide insights into the reasons we propose to make them.

4. In 1970 we reallocated 115 megahertz of spectrum in the 806-947 MHz band to land mobile use.[3] The private land mobile radio services received 30 megahertz (or 600 channels) of this allocation and the newly created cellular radio service received 40 megahertz of the allocation.[4] At the time, we anticipated that this spectrum allocation would satisfy land mobile communication requirements into the 1990's, provided it was used as efficiently as possible. Toward that end, the public land mobile portion of the allocation was designated for the highly efficient cellular radio service. Due to the more varied nature of the private radio services and users, we took a different approach in making this latter allocation; that approach was designed to promote spectrum efficiency while accommodating the diverse mobile communications operations of over twenty distinct private radio services.

5. The balancing of these objectives led us to implement a regulatory structure that differed markedly from the traditional rules governing private radio systems. Under this scheme we initially released 300 channels for use by any Part 90 eligible. We required, however, that 200 of the channels be used only in the spectrally efficient trunked mode of operation. We also provided that 100 channels could be used in the traditional single channel conventional mode.[5] These 300 channels, which were regulated by a newly created Subpart M, were assigned on a first-come first-served basis. Applications that could not be granted because channels were not available were placed on a waiting list until channels became available. Under Subpart M, licensees of trunked systems must meet a 70 mobile units per channel loading requirement within five years of authorization. Systems that are not loaded to this level are subject to our channel recovery program, and the recovered channels are reassigned to applicants on the waiting list.

6. The remaining 300 private land mobile channels were placed in reserve so that we could use our experience with the initial 300 channels to determine the optimal means to release them. However, by 1978 there were shortages of conventional channels in the major metropolitan areas. We therefore released an additional 50 of the remaining 300 channels reserved for private land mobile radio and designated them for conventional use.[6] By late 1979 sizable waiting lists began to form for trunked channels in the major metropolitan areas. To alleviate this spectrum shortage, we released the remaining 250 private land mobile channels in July of 1982. In doing so, we created a new rule subpart, Subpart S, to govern these new channels as well as the conventional channels previously governed by Subpart M.[7]

7. However, unlike our previous allocation governed by Subpart M, these new channels were not divided according to system technology.[8] Rather, they were grouped into four specific service categories: Public Safety/Special Emergency (70 channels), Industrial/Land Transportation (50 channels), Business (50 channels), and Specialized Mobile Radio (80 channels). Applicants in each of these categories were given the flexibility to choose trunked or conventional technology. Under Subpart S, licensees of trunked systems must meet three and five year loading requirements of 60 and 80 mobile units per channel, respectively.[9] Applications for Subpart S channels that cannot be granted because channels are not available for assignment are dismissed and returned to the applicant. Thus, at the conclusion of this proceeding we had two separate rule subparts governing trunked private land mobile radio systems at 800 MHz, with different loading standards and different application processing procedures.

8. To provide a smooth transition for trunked licensees governed by Subpart M to the new rules contained in Subpart S, we allowed licensees to operate under the old rules for five years. At the end of that period, on September 1, 1987, existing trunked systems licensed under Subpart M will be governed by Subpart S. At that time, all 800 MHz systems will be subject to this subpart.[10]

b) Development of SMR Service

9. Increasing congestion of private land mobile spectrum and resulting demand for more channels caused us in the Docket No. 18262 allocation proceeding to adopt a plan specifically designed to promote the larger and more effective use of the 800 MHz spectrum. That plan had two essential features. First, we made a sizeable allotment to multichannel trunked systems which, as mentioned, were more efficient than any previous private radio technology. Second, we decided to allow licensees to provide radio service to Part 90 eligibles on a commercial basis to encourage them to take the risks involved in using this costly and more complex new technology,[11] and to meet the varied needs of private users in the most efficient way possible.

10. We called this new service the Specialized Mobile Radio (SMR) service. In creating the SMR service we intended to encourage a competitive private land mobile market, as well as to promote new system designs, technology and marketing techniques to develop the new spectrum to the maximum extent.[12] We made it clear that we intended to review this regulatory plan on an ongoing basis, recognizing that several of these actions were new, untried and untested changes made on our own motion with limited input from the industry.

11. Our plan to promote the use of the new spectrum by allowing entrepreneurial activity in the private land mobile services proved immensely successful. Most of the systems licensed for the 200 trunked channels released in 1974 were for SMR service. The demand for these trunked channels was so great that they soon were all assigned in many markets. For this reason, in the 1982 allocation proceeding we released 80 channels exclusively for use by SMR systems since the demand for trunked channels came mainly from that private radio service.[13] This was more than we gave to any other service group. Even this amount was not enough to meet pent up demand and all SMR channels were assigned in 15 metropolitan areas immediately after the 1982 channel release.[14] We have attempted to alleviate the shortage of SMR spectrum by recovering underutilized channels and reassigning those channels to other applicants.[15] We have since allocated five megahertz of additional spectrum in the 900 MHz band for the SMR service.[16]

12. We believe the SMR industry has matured sufficiently since the first systems were authorized in 1978 to warrant a comprehensive review of the policies governing these systems. Therefore, we are beginning this proceeding to develop a single, consistent regulatory approach for the SMR service - one that reflects current market realities and that will provide an environment conducive to increased benefits for SMR users and service providers. In the discussion that follows, we will address the rules on SMR loading standards, processing and assignment procedures, partial channel assignments and eligibility provisions regarding SMR end-users. We are also clarifying our policies concerning for-profit operation in the 800 MHz band. We make these proposals based on our experience in regulating SMR systems, on suggestions we have received from SMR operators and trade associations, and on recent developments in the SMR industry. We encourage comments on these issues and on any others relevant to our proposals.

III. Loading Standards

a) Development of Loading Criteria

13. Like many other policies applicable to 800 MHz systems, mobile loading standards were first developed in Docket No. 18261, the proceeding that allowed land mobile users to share UHF television channels 14 through 20 (470-512 MHz).[17] We adopted these loading standards to facilitate sharing of pooled channels and to evaluate requests for additional channels.[18] Thus, before a licensee in one pool could use spectrum in another pool, we required that licensee to show that its system was loaded to a prescribed level. Similarly, we required licensees to show that an assigned channel pair was operating at full capacity before they would be given a second pair.[19] We used these loading standards to encourage licensees to use their communications channels to the fullest potential.

14. Loading standards were initially controversial. Several land mobile users and their representatives argued that instead of using set standards, the Commission should consider other factors such as the number and size of the systems sharing a frequency pair, the type of traffic being carried and the nature of the activity of the licensee. The commenters also opposed the specification of a fixed number of mobile units to indicate full capacity in each service. Finally, they argued that loading standards should be used only as guidelines in handling requests for additional frequencies on a case-by-case basis.[20]

15. We rejected these arguments in favor of an objective and consistent loading standard to avoid deciding spectrum use issues case-by-case. Our goal was to establish objective levels of occupancy so that potential users could readily determine whether a frequency was available and to what extent sharing would be required.[21] We concluded that incorporating multiple factors into a standard was too complex to fulfill this goal. We noted that channel loading would be essential to the service pool concept because loading information would show the accessibility and operational environment of certain channels.[22] We recognized that our decision to require specific loading counts of land mobile users was new to the industry, but believed that loading standards were necessary to monitor the use of the new allocation and to ensure a high degree of spectrum efficiency.

16. While we were creating service rules for the 470-512 MHz band, we were also reallocating spectrum in the 806-947 MHz band to accommodate additional land mobile growth.[23] In the service rules for the new allocation,[24] we allowed licensees exclusive use of channels when they met minimum loading standards. Once these standards were met, a licensee would be entitled to a 70 mile protection area.[25] We extended the notion of channel exclusivity first introduced in the private services in Docket No. 18261 to these 800 MHz channels because we felt that the assurance of a guaranteed communication service quality was needed to encourage private radio eligibles to make the additional expenditure required to operate in this new spectrum.[26]

17. In setting loading standards in Docket 18262, we again considered a variety of factors including average message length, number of operating units, number of

times per hour that dispatchers and mobiles originate calls, number of dispatchers on duty at any one time, size of the system, and functions and activities of the licensee. Ultimately, as we had done in Docket 18261, we decided to use a consistent standard to measure loading, and applied separate loading standards to each service.[27]

18. In Docket No. 79-191, which released the remaining 250 channels held in reserve by Docket No. 18262,[28] we decided to revisit the loading rules. First, we established a uniform loading standard of 70 mobiles for all conventional systems, regardless of the service involved.[29] We also altered the loading standards for all trunked channels governed by Subpart S. Instead of providing for a five-year loading deadline of 70 mobiles per channel, as we had done in Subpart M, we required the new systems to be loaded to 60 mobiles per channel within three years of authorization and 80 mobiles per channel within five years of authorization.[30] Any systems that failed to meet these standards would lose all channels not loaded to 100 mobiles each.[31] All trunked system licensees under both Subparts M and S were required to attain a loading level of 90 mobiles per channel to obtain additional channels.[32]

19. In November 1983, we rejected requests for overall reconsideration of the loading standards established in the *Second Report and Order* in Docket No. 79-191. We also declined to reconsider the channel recovery plan established in the *Second Report and Order*. We acknowledged that enforcement of loading standards could work a severe economic penalty on operators with insufficiently loaded systems. Our interest in providing channels to the most licensees possible and ensuring that channels be used to full capacity, however, persuaded us to retain rules regarding loading and channel recovery.[33]

20. We did modify the loading standards in Subparts M and S to permit licensees to count control stations to substantiate loading of trunked systems. We also changed the rules to allow existing trunked licensees to be placed on a waiting list for Subpart M trunked channels when they are loaded to 70 mobile units per channel instead of 90 mobile units per channel. In addition, we modified the Subparts M and S rules to permit existing trunked licensees to obtain additional channels when their systems are loaded to 80 mobile units per channel instead of 90 mobile units per channel.[34] Finally, we declined to implement different loading standards for urban and rural areas because we do not recover channels from licensees who have failed to load their channels unless they are in an area where there is no spectrum available.[35]

21. In summary, we first introduced loading standards to the private land mobile radio industry in 1971 to help determine whether a licensee had used assigned channels to their full capacity and qualified for a further assignment; to enable us to set standard levels of channel occupancy; and to provide potential users with a method to determine channel availability and the degree to which sharing would be required. We extended loading to the 800 MHz proceedings[36] to further these original objectives and, later, to ensure full use of the spectrum.

b) Recent Developments

22. Several developments in the SMR industry in the past few years cause us to reevaluate our loading policies. First, until our recent 900 MHz allocation decision, the country's top 15 or 20 urban areas had no spectrum available for new or expanding SMR systems. We have had waiting lists for trunked channels in many metropolitan areas since 1979. When we released the reserve channels in 1982, we immediately received applications for more SMR channels than were available in 15 areas. We therefore employed lotteries to assign those channels. Due to steady demand, we still are conducting lotteries as SMR frequencies become available.[37] It is obvious from the demand for channels by SMR licensees and the dramatic increase in the number of users of SMR systems that the SMR concept is a success, raising the possibility that the free market can supplant regulation of channel occupancy.

23. Second, the number of SMR licensees that have fully loaded trunked systems and are seeking channels to expand those systems is steadily growing. We recently completed a rule making proceeding to grant a priority to waiting list licensees expanding fully loaded trunked systems. The increasing number of SMR licensees expanding fully loaded systems also suggests that it may no longer be necessary to use stringent loading standards to assure maximum spectrum use by SMR systems.

24. A third development in the SMR industry is the increased offering of interconnected communications. We have encouraged the provision of interconnection,[38] and other service options. However, interconnection usually leads to messages longer in length than traditional dispatch communications. Because our loading standards are based on dispatch communications, systems that offer interconnection are often disadvantaged because they cannot meet the necessary loading requirements. To meet the requisite loading standards, SMR licensees are forced to limit or prohibit the use of interconnection on their systems. Therefore, we see a need to evaluate our loading policies to assure that they do not unduly restrict new service options for end users.

25. A fourth point is raised by a petition for rule making we received from the American SMR Network Association (ASNA).[39] ASNA urges us to relax our loading requirements in rural areas to allow easier expansion of trunked systems in those areas.[40] ASNA argues that our loading rules restrict the expansion of rural systems in areas where there is spectrum available, thus precluding the development of larger trunked systems that can provide a higher quality of service. ASNA suggests that we allow SMR licensees to expand their trunked systems without meeting loading requirements if the systems are more than 150 miles away from markets where all available trunked channels have been assigned and the systems have been constructed.[41]

26. We received comments on the ASNA petition from Motorola, Inc. and the National Association of Business and Educational Radio (NABER).[42] Both commenters support the proposal. NABER and Motorola each suggest that we consider how our loading rules would be applied to a licensee that had expanded under the ASNA proposal if the licensee's geographic area later became congested. NABER also notes that an alternative to using a standard of 150 miles from major cities would be to propose that revised loading standards be used every place outside the top 21 cities. Motorola would use revised loading standards for areas 100 miles away from the largest cities. In its reply, ASNA agrees with the suggestions of the commenters and supports the broadest possible application of its request.

27. In the ensuing discussion, after first reviewing the virtues of loading, we review several factors that persuade us that loading standards may no longer be appropriate

and lead us to propose their elimination. We also discuss the other options that are available should we choose to retain some form of loading requirement. We encourage comments on all aspects of this discussion and any other pertinent matters.

c) Reasons to Retain Loading Standards

28. As discussed more fully above, loading standards have served a number of very useful functions in helping to regulate the new SMR industry and the use of the 800 MHz band in general. We imposed loading standards largely to assure that the 800 MHz private land mobile spectrum was used as efficiently as possible. They have served this purpose well. Loading standards tell us when channels appear to be underutilized or congested, enabling us to reassign channels from licensees that are not using them to those that will. Our ongoing loading enforcement and channel recovery program has resulted in the reassignment of over 2200 channels from licensees who either did not construct the system for which they were authorized or who failed to meet our loading standards. Thus, any initial inclination of licensees to warehouse frequencies for future use was effectively discouraged and a minimum degree of competition in the SMR communications marketplace was ensured.

29. The same consideration may be relevant to the release of the new spectrum at 900 MHz. The volume of applications could be even greater than we received for the release of SMR channels in 1982 since SMR service has become more widely established. Given the Commission's recent experience in the cellular area, it can be expected that a number of speculative applications will be filed for this new SMR spectrum. Loading standards could prove useful, once again, in weeding out licensees who do not use their authorizations to the fullest extent, and in reassigning them to those who will.

30. Loading standards also have served as a mechanism to assign preferences to licensees of fully loaded trunked systems seeking to expand. We encourage licensees to expand because doing so improves spectrum efficiency and service quality. Furthermore, to the extent loading standards deter interconnected communications on SMR systems, they preserve the original character of SMR systems as a dispatch service suited to the distinct requirements of a sizable proportion of the traditional private land mobile community.

31. Finally, loading standards have helped us monitor the overall utilization of the 800 MHz spectrum. In fact, this monitoring process has enabled us to identify the rapid increase in use and demand for private radio systems, especially over the past few years.[43] The facts revealed by the oversight of channel occupancy led directly to the proposed and subsequent allocation of 900 MHz land mobile reserve spectrum to ease current and projected channel congestion problems of SMR and other private land mobile radio systems.[44]

d) Reasons to Eliminate Loading Standards

32. As summarized above, there may have been valid reasons for initially imposing loading standards. However, recent developments in the SMR industry suggest that it is time to reevaluate them as a means of ensuring maximum market flexibility. Also, any relaxation or elimination of loading standards raises a number of competing concerns that should be assessed. The following discussion sets forth the reasoning for our proposal and outlines several alternative options.

33. Initially, we no longer need loading standards to monitor the efficiencies of trunking.[45] Trunked technology has been actively used in the private radio services for more than eight years. We are now certain that our original theories on the efficiencies of trunked technology were correct. Experience confirms that as the number of channels in a trunked system increases, so does the number of users per channel without an appreciable decrease in service quality.

34. Furthermore, when loading standards were first imposed, we were authorizing up to 20 channels at one time to each SMR licensee. However, we no longer assign more than five channels at one time to SMR licensees in the 800 MHz band.[46]

35. Additionally, and more significantly in our view, the SMR market has matured and now contains many experienced system operators who are diligently marketing the service to Part 90 eligibles. The number of SMR users, especially in the major markets, has grown dramatically in the last few years. This growth is a result of reduced equipment costs, improved and more aggressive SMR operator marketing techniques, and increased consumer awareness and sensitivity to the benefits of good mobile communications service. The burgeoning SMR market, far from tolerating idle spectrum, has exerted pressure on operators to use their systems intensively.

36. Another reason to eliminate loading standards is that they prevent SMR licensees from adapting system quality to changes in the market. In effect, loading standards place a restraint on the quality of the communications service that can be provided by an SMR entrepreneur. As previously discussed, loading standards may restrict an operator's ability to offer interconnected service. An operator offering this more spectrum- intensive interconnection service may then be unable to serve the number of mobiles specified in our rules and, thus, would stand to lose channels based insufficient loading. Furthermore, because of our emphasis on loading, SMR licensees may be unable to satisfy other unique service requirements of some end users, such as digital transmissions, paging, alarm and fixed services.[47]

37. We also have seen SMR licensees exploring new marketing and business strategies to provide enhanced service to their users. SMR licensees located in areas where there are spectrum shortages have begun to share system computer controllers to expand their channel capacity. For example, by sharing a system controller, two five-channel system licensees can provide their end users with access to ten channels and potentially higher service quality. SMR licensees in different geographic regions have also begun to enter networking agreements to provide access to SMR channels in many areas. For instance, an SMR end user with a business in Washington, D.C. could use an SMR system in New York City while there on business, if his or her SMR service provider has a networking agreement with an SMR licensee in that city. Loading standards can hinder such arrangements because of the complications associated with attributing mobile units to a specified SMR system for purposes of meeting loading requirements.

38. Loading standards also inadvertently manipulate the SMR market by causing a system's value to decrease as it approaches its loading check points if it is insufficiently

loaded.[48] We have seen SMR licensees respond to the spectrum shortage by obtaining assignments of channels from lesser used systems or from licensees who no longer want to operate their systems.[49] This is a marketplace development we would like to encourage because it ultimately leads to more efficient use of the spectrum. However, we have also seen marked decreases in such activity as the loading deadlines for systems in particular areas are approached. This may be because our loading requirements create an economic incentive for licensees seeking to expand their systems to delay purchasing another system or entering into a sharing agreement until the Commission has recovered and reassigned channels.

39. If we eliminate loading standards, licensees seeking additional channels to expand their systems would have to obtain them from other SMR licensees through private marketplace transactions. We believe this is a better mechanism for assuring that unused or underused channels are assigned as quickly as possible to licensees needing them. While this may prove to be more expensive than obtaining free assignments of recovered channels from the Commission, it would eliminate Commission involvement and reduce the waiting time for expansion. Now, licensees must either wait in queue to receive recovered channels or they must watch for public notices listing recovered channels, file their applications and take part in lotteries. Additionally, each channel recovery made by the Commission is subject to a 30 day reconsideration period. Therefore, it often takes several weeks, if not months, for applicants to receive recovered channels. On the other hand, if we allow SMR licensees to obtain channels from other licensees, the parties themselves can negotiate at their own pace and file an application for assignment of the channels. The Commission must still act on assignment requests, but the assignment process is much quicker than channel recovery and reassignment. Such a market-based approach will facilitate the reassignment of SMR channels based on the unique economic and operating environment of each market area, rather than on a single nationwide standard imposed by the Commission. This also would allow us to redirect the scarce resources we use to monitor loading levels, recover channels and reassign channels, and use them for matters of higher priority.[50]

40. While we only have discussed eliminating loading standards for trunked SMR systems, we would also propose eliminating loading standards for trunked systems in the three non-SMR pools. Such an action would provide a consistent approach for all trunked systems in the 800 MHz band. We currently use loading standards in two ways for trunked system in the non-SMR pools: (1) we require an initial indication of loading by applicants requesting five or more trunked channels; and (2) we use loading levels as a criterion in deciding whether to grant requests for interpool sharing in the non-SMR pools. If we eliminate loading standards in the non-commercial pools as well as the SMR pool, we would no longer be able to use loading levels as a factor in facilitating interpool sharing or in authorizing trunked channels. We ask commenters to consider the impact of eliminating loading standards on non-SMR trunked systems; whether such a change would be beneficial; and whether we should retain loading only as criterion for evaluating interpool sharing requests.

e) Alternatives to Elimination of Loading Standards

41. Although we are proposing to eliminate loading standards, we will continue to enforce them during the pendency of this proceeding. Further, we do not intend in any event to alter our construction requirements.[51] We realize that the elimination of the loading standards could have a significant impact on the current SMR market and on other valid Commission policies. Accordingly, we have outlined alternatives to our proposal in the next section.

42. Loading standards have clearly played a major role in the successful evolution of the SMR industry from its infancy in 1978 to a mature and thriving communication service in 1986. Although we have proposed total elimination of loading standards for SMR systems we are concerned that in our quest to increase SMR licensee flexibility and options we may be inadvertently creating new problems. Therefore, we are anxious to explore all possible alternatives to the complete elimination of loading standards. To that end, we will discuss four alternative approaches to loading standards: (1) using loading standards only as a mechanism to determine eligibility for an SMR licensee to obtain additional channels within a market; (2) using loading only as a criterion for evaluating interpool sharing requests involving SMR systems; (3) retention of existing Subpart S loading standards in only a designated number of the largest metropolitan areas of the country; and (4) retention of the existing loading standards as set forth in Subpart S.

43. One option we might consider if we decide to retain some part of our loading rules is to require a specific showing of loading by applicants seeking recovered channels to expand existing systems.[52] If there were only one request for the recovered channels, of course, we could simply reassign them to the applicant in question. In most cases, however, requests for recovered channels cannot all be satisfied because the channel demand exceeds the number of channels available. Loading standards could be useful in assigning channels in these situations. For example, we could assign channels to the applicant whose system is most heavily loaded.[53] Alternatively, we could consider all applicants with systems loaded to a specified level in a lottery.[54] Either of these two approaches would allow fully loaded trunked systems to expand and provide service to a greater number of users. This would reward licensees demonstrating the greatest need for additional channels and would ensure that channels are assigned in a way that promotes our goal of spectrum efficiency.

44. A second option would be to require minimum loading to be established only as a precondition for interpool sharing. SMR licensees and eligibles cannot presently use channels outside the SMR pool at 800 MHz. We have recently proposed, however, to allow interpool sharing by SMR, Industrial/Land Transportation and Business eligibles.[55] Under that proposal an applicant interested in interpool sharing would first have to show that its SMR system is fully loaded. This requirement would prevent spectrum hoarding by SMR licensees and alleviate the concerns of users in the other pools that SMR licensees will immediately use all the available channels. Obviously, if we eliminate loading standards we will have to establish another criterion to facilitate interpool sharing -- otherwise, users from different pools would use channels where it was easiest or most convenient and the distinct service pools would be eliminated.

45. A third option would be to retain loading requirements in a designated number of top markets, where the demand for SMR service is greatest. Loading standards are one way to assure that channels in these markets are used to their fullest extent.[56] While efficient spectrum use is also important outside the largest markets, the demand for SMR spectrum in these areas has not yet outstripped supply. Therefore, we could allow greater flexibility without compromising the essential basis of the service. This alternative is, in essence, the ASNA proposal, and raises the questions noted in conjunction with our discussion of that petition.[57] If we pursue this option, we will have to decide what loading standards should govern the top markets, what the top markets are and how to define the area of each top market, and how we would apply the loading standards to an area that becomes congested at a later time. We urge interested parties to consider this option when preparing their comments.

46. A fourth option would be to retain the loading standards as presently formulated in Subpart S, or with slight modifications. For example, we could delete the three year loading requirement on the theory that this degree of oversight is no longer needed. Alternatively, we could retain the Subpart S loading rules, or a revised version of them, for both the 800 and 900 MHz channels. Or we could eliminate the use of loading standards for the 800 MHz channels and only apply them to the new 900 MHz channels where they may serve a useful purpose by encouraging maximum spectrum use of this new allocation.

f) Conclusion

47. On balance, we find that there are benefits and detriments to the loading program. We believe that the current loading program has provided SMR operators with a considerable incentive to promote trunked communications systems to the extent necessary to ensure their effective use. As a consequence of this program, public acceptance of trunked systems has been rapid and has facilitated the development of a mature private land mobile communications marketplace in the 800 MHz and 900 MHz bands. On the other hand, the rigid emphasis on quantity over quality that is inherent in loading standards may have resulted in some undesirable distortions in the supply and demand relationship that inhibits SMR operators from providing needed communications services and benefiting from natural econmomic efficiencies. We therefore believe that an essentially unrestricted communications marketplace may be a superior alternative to loading standards in meeting consumers' demands. We solicit comment on the range of options discussed above, that are intended to provide SMR licensees with varying degrees of flexibitlity in meeting the communications needs of their customers.

IV. Transfer of Subpart M Trunked Channels to SMR Pool

48. As discussed above, the *Second Report and Order* in Docket No. 18262 allocated 300 private land mobile channels for use with trunked or conventional technology.[58] When Subpart M is eliminated on September 1, 1987, the 200 trunked channels governed by that subpart will be regulated by Subpart S, under which channels are apportioned into four service pools.[59] We thus must designate the Subpart M trunked channels to one, or more, of these service pools.

49. We propose to designate these 200 trunked channels for use by SMR systems together with the 80 channels designated for SMR use at 800 MHz and the 200 channels designated for SMR use at 900 MHz, under Subpart S. Any existing non-SMR users on the 200 trunked channels would be grandfathered indefinitely. Also, any applications submitted by non-SMR eligibles on a waiting list for the 200 trunked channels would be permitted to stay on the waiting list.

50. We believe that the fact that all but thirteen of the hundreds of trunked systems licensed on the 200 trunked channels are SMR systems justifies our designating these channels for use in the SMR pool. Further, there is now only one non-SMR applicant on one waiting list for the 200 trunked channels.

51. Another factor underlying our proposal is the current dichotomy between processing procedures for SMR and non-SMR trunked systems. All non-SMR trunked systems require frequency coordination prior to submission for Commission approval, while SMR trunked systems are submitted directly to the Commission for coordination and licensing.[60] If the 200 trunked channels continue to be made available to non-SMR systems as well as SMR systems, these channels would be submitted to two different processing procedures depending on the type of system requested.

52. We do not believe that adoption of this proposal will impose a significant hardship on private applicants for non-SMR systems. Our experience indicates that the predominant type of non-SMR system licensed is a single channel conventional system, which would not be affected by this proposal because we are only suggesting changes to the processing of trunked systems. However, we invite comments on alternative methods of processing the 200 trunked channels, such as continuing to make them available to any Part 90 eligible - SMR or non-SMR.

V. Processing and Assignment Procedures

a) Background

53. Presently, we have two assignment procedures for trunked systems in the 800 MHz band - waiting lists and filing windows. The waiting list procedure applies to the old 200 trunked channels.[61] These channels are available to applicants from any service group who propose to use trunked technology.[62] If applications for these channels cannot be granted because frequencies are not available, they are placed on a waiting list and ranked in two groups of descending priority. The first group is comprised of licensees with trunked systems loaded to at least 70 mobile units per channel,[63] and the second group is comprised of all other applicants. Each application is placed in its appropriate group in the order it is received by the Commission. Available frequencies are then assigned to the highest ranking applicant eligible to use them.[64] Trunked system licensees that have had channels recovered by the Commission for failure to meet the loading requirements are not permitted on the waiting list for six months after their new license has been issued.[65]

54. The 250 channels allocated in Docket No. 79-191[66] are processed according to a different procedure. Each application is processed as it is received by the Commission, and, if there are channels available where requested, the application is granted. If, however, there are no channels available the application is dismissed rather than being ranked and placed on a waiting list.

55. When the 250 new channels were released in 1982, we set filing window running from November 15, 1982 through December 15, 1982. Within this period, we announced that we would initially accept applications for this new spectrum. If more applications were received than there were available channels in any one area, the selection was to be made by means of a lottery.[67] In response to the open filing window we received applications for more channels than available in the SMR pool in fifteen areas. As a result, we issued a public notice establishing lottery procedures to dispose of the applications.[68]

56. At the present time, window and lottery procedures continue to be used to process Subpart S applications.[69] When channels become available and we receive applications on the same date for more channels than available, those applicants that are considered equally qualified based on established comparative criteria[70] vie for the channels by lottery. All applications filed after that date for the same channels in that area are dismissed. This procedure creates, in effect, a "day-to-day window" because we accept applications only on dates when channels are available.

57. Some difficulties have been encountered with both the waiting list and window procedures. Certain of these problems stem simply from the fact that we have two distinct sets of rules governing processing and assignment in the 800 MHz band. This has proven to be a source of confusion for the industry and it has caused administrative difficulties as well. In this proceeding we hope to remedy this situation by adopting a set of unified rules applicable to the old 200 trunked channels, the new 250 channels in the 800 MHz band, and to the recently allocated 200 SMR channels in the 900 MHz band. Our proposed rules, which will be contained in a revised Subpart S, are discussed in detail below. However, before we set forth our proposed processing procedure for all SMR applications, we believe a discussion about our experience with current procedures will shed some light on the direction we propose to undertake.

b) Waiting List

58. We have used waiting lists to reassign channels since 1979. By that time, all trunked channels allocated in Docket No. 18262 were assigned in the major markets. We chose the waiting list procedure since it seemed equitable and easy to administer. Under the waiting list procedure, applicants only need to submit one application for channels in a particular geographic area and they will be considered automatically for any channels that become available. The workload and processing time for maintaining and reviewing the waiting lists is relatively constant and, from an administrative standpoint, we are able to predict the resources necessary for this task.

59. Even so, as noted, we have encountered some problems with administering waiting lists. In late 1984, we began to offer "odd lot" channels (less than five) to applicants on the lists as a result of channel recovery actions. To reassign these channels, we initially sent letters to waiting lists applicants in rank order until we obtained an affirmative response. This procedure proved to be very time consuming. In an effort to improve this process, in early 1986 we began to send letters simultaneously to a group of applicants on the waiting list to speed the process. Some improvement in processing time was accomplished by this modification in our procedures, but this required correspondence with as many as five applicants when only one could ultimately be granted.

60. Another problem with the waiting list procedures developed when we decided to send letters to applicants on the waiting list, in rank order, to ask them if they wanted to relocate their transmitter site to be eligible for recovered channels. The issuance of these letters increased the time required for the reassignment of recovered channels because we rarely received affirmative responses and we could not reassign the channels until we found an applicant that "fit" the frequencies. In early 1985 we now decided to discontinue our policy of issuing relocation letters. Instead, we rely solely on the transmitter location specified on the application to determine whether a waiting list applicant can use the recovered channels.

61. Our 1985 decision to award preferences to waiting list applicants expanding fully loaded trunked systems[71] also created implementation problems.[72] Following that decision, we reorganized waiting lists to reflect preference entitlements. Soon thereafter we received several requests from applicants seeking to modify their applications for new trunked systems to applications to expand existing loaded trunked systems. This caused some confusion as to the placement of the applications on the waiting list. We eventually decided to allow such modifications. However, in doing so, we awarded the preference as of the date of modification rather than the date of the initial application. This prevents applicants from using our procedures to bypass others also on the waiting list seeking to expand their loaded systems.

c) Window and Lottery Procedures

62. We deviated from Subpart M processing methods when we released the 250 new channels governed by Subpart S in an effort to give all applicants an equal chance to obtain the new channels. The most significant difference between Subpart M and S procedures relates to applications filed for areas where no channels are available. Under Subpart S, instead of placing applications on a waiting list for an indefinite period, they are dismissed. We thought that this approach would be far less cumbersome than retaining and updating waiting lists.[73]

63. We have also encountered problems when processing applications and assigning channels under the Subpart S filing window procedures. Lotteries tend to give an equal chance to all applicants within each comparative group. Nonetheless, we have found that the process has been confusing to applicants and difficult for us to administer. Applications are accepted only if they are filed on a date when there are channels available. Otherwise, they are dismissed. Until recently, applicants were unable to determine precisely when channels became available for reassignment in areas with spectrum shortages. Therefore, they would file applications daily. This caused extra work for applicants and for our staff. Now, however, we issue public notices specifying the dates on which recovered channels will be available for reassignment, which gives applicants notice of available channels and an equal chance to apply for them.

64. The filing window procedures also created problems as we approached the construction deadlines for the first group of SMR systems licensed under Subpart S. Pursuant to Subpart S rules, licenses cancel automatically if the licensee fails to timely contruct.[74] Knowing this, applicants would file on the date of the one year construction

deadline, believing that the licenses would cancel automatically and that the channels would be available for immediate reassignment. However, when channels are recovered, whether due to failure to load or failure to construct, a thirty day period for reconsideration is allowed each licensee. Until that time has passed, the Commission does not take any action to make the channels available for reassignment. Indeed, we do not accept applications for these channels until the reconsideration period is over, and our data base is updated. However, due to the uncertainty concerning the exact dates that channels would be available for reassignment, applicants then began to submit applications daily from the deadline date for construction until the Commission either reassigned the channels or declared a lottery situation. This daily filing procedure was unworkable for both the applicants and the Commission: applicants were expending significant amounts of time and resources by submitting applications daily and we were spending significant amounts of time processing those applications even though no channels were available.

65. To alleviate these difficulties, we revised the process by periodically issuing public notices specifying the frequencies, coordinates and geographic areas of recovered channels.[75] The channels listed in each public notice would be available for reassignment on the date specified by each public notice. Any applications filed earlier than the specified date would be dismissed.[76] This interim procedure alleviated our concern that the public was not receiving notice of precisely when recovered channels were available for reassignment. However, as we began to issue public notices announcing the availability of channels, we encountered other problems.

66. First, we began to realize that the issuance of the public notices was generating more interest in the available channels than we had anticipated.[77] This had two results: more applications were filed than expected which caused a delay in processing; and, the abundance of applications, of course, resulted in many more lotteries than expected,[78] which caused additional processing delays. The mere announcement of a filing window seems to generate large numbers of applications and increasing workloads. In some instances, many applications have been filed for recovered new channels when there were old channels readily available. Thus, the announcement of a filing window and likely lottery seems to fuel speculative interest, making the process more difficult and time-consuming.

67. Second, many of the public notices listed channel blocks at the same location or in close proximity to each other. This caused some confusion as to whether applicants could file for more than one channel block because the blocks were located within 40 miles of each other.[79] The confusion was caused by Section 90.627 of our rules, which limits an applicant to one unloaded system within a 40 mile area.[80] We also released different public notices which listed channel blocks at the same location that would be available at different times. This caused some confusion as to whether applicants could apply for identical locations in response to each public notice, because this would result in multiple applications for the same frequencies within a 40 mile area.[81]

68. Third, due to the issuance of public notices, we have begun to experience spectrum shortages in remote or uncongested areas where there previously had been substantial spectrum available. This is, in large part, a consequence of the "gold rush" mentality of applicants responding to these notices, causing us to receive numerous filings for each channel block listed in the notices.

d) Proposed procedures

69. Based on our overall experience, we believe that waiting lists expedite the reassignment of channels. They do not have the lag time associated with the window procedures caused by the need to publicize channel availability, to establish the filing windows, and to schedule and conduct lotteries. Also, most of the past problems with the administration of the waiting lists have been alleviated through policy or rule changes, and the procedures have been streamlined to the point where the system is working smoothly. We expect even further improvements in the future. Finally, we believe that the use of waiting lists provides applicants with a surer, quicker system for monitoring the progress of their submissions. We now update and publish our waiting lists in monthly public notices.[82] This way applicants are able to check easily the status of their applications as of the effective date of the last waiting list public notice.

70. We therefore propose to implement a unified waiting list for the 200 trunked channels under Subpart M and the 80 SMR channels under Subpart S.[83] All of these channels will be designated for SMR use except for those non-SMR licensees now licensed on the 200 trunked channels, which will be grandfathered indefinitely. Also, any non-SMR applications on a waiting list for the 200 trunked channels will be permitted to stay on the waiting list.[84]

71. The question, however, is how to make the transition from the use of filing windows for the 80 SMR channels to the use of waiting lists. If we decide to use waiting lists for all the SMR channels, we would keep intact the current waiting lists for the Subpart M trunked channels. We would conclude the ongoing lotteries for recovered channels in the Subpart S SMR pool that were described *supra*. Once these lotteries are concluded, all the channels recovered from the SMR pool and the 200 trunked channels would be reassigned under our waiting list procedures. Any new applications would be granted, if possible. If there are no channels available, the applications would be added to the current waiting lists in chronological order. If we decide to continue to award preferences to fully loaded trunked systems, those applicants with preferences would be placed ahead of all applicants for new systems and chronologically behind all preferred applicants already on the list.[85] Channels would be reassigned from the 80 channel SMR pool and the 200 trunked channels. They would be granted to the highest ranking applicant that is able to use them.[86] This process should provide for orderly and expeditious reassignment of channels to applicants and it should also be easier for us to administer.

72. We have examined both sets of rules governing our processing and assignment procedures. Obviously, a single processing and assignment procedure for all SMR systems will simplify our rules. To that end, we believe that the waiting list procedure is the best of the two procedures now used. While we believe that our current waiting list procedure has more public benefits than windows and lotteries do, we encourage parties to present alternatives or modifications to either the waiting list or open window procedures. Our goal is to develop a unified procedure

that will benefit applicants and assist us in processing their submissions as quickly as possible. e) Impact of repeal of loading standards on waiting lists

73. Our proposal to eliminate loading standards raises questions about whether we should continue to award preferences or comparative points for systems that are loaded to a certain level. It also requires us to consider how we would administer the waiting lists or windows in the absence of loading criteria.

74. If we decide to eliminate loading we would still recover channels for failure to construct and for violations of the Communications Act and our rules, although the number of channels recovered would be much lower and, therefore, the time required to obtain channels much longer. Therefore, it would still be necessary to maintain waiting lists or use window procedures to reassign these channels. If we also decide not to use loading standards to award preferences or comparative points, then the waiting lists entries would be ranked in chronological order and the lotteries would rank all applicants equally. Alternatively, if we decide to keep loading standards to encourage the expansion of fully loaded trunked systems, the preference system for the waiting lists would remain as it is now, and so would our comparative point system for the window procedure and lotteries. A third option, as noted earlier, would be to keep the status quo. In this event, procedures for the waiting lists would remain the same, as would window and lottery procedures.

VI. Partial Assignment of Authorizations

75. We also want to take this opportunity to explore whether we should now permit partial assignments of 800 MHz multichannel trunked system authorizations, currently prohibited by our rules. A partial assignment is an assignment of less than the full number of channels for which a licensee is authorized. Although the rules do not apply only to trunked authorizations, their application to conventional systems would not be meaningful because only single conventional channels have been authorized to SMR systems.[87]

76. When we first allocated the 800 MHz channels in 1974,[88] we encouraged licensees to use these new channels in the most spectrum efficient fashion. Trunked channels were assigned in maximum groups of 5, 10, 15 or 20 channel blocks. By assigning channels in this way, we hoped to create large, spectrum efficient trunked radio systems.

77. We also decided to prohibit partial assignments of such systems for several reasons. We realized that authorizations of twenty channel systems could encourage some applicants to obtain more spectrum than they really needed. We were also concerned that permitting partial assignments could lead to the dismantling of the larger, more efficient radio systems. The policy against partial assignments prevented applicants from obtaining unnecessary channels and later assigning a portion of their authorized channels to others, thus undermining the purpose of our allocation scheme.

78. Now, however, we no longer assign channels in large channel blocks to SMR licensees. Rather, we limit trunked channel assignments in the 800 MHz band to five channel blocks. This change in policy was designed to maximize the number of SMR licensees and to reduce the likelihood of individual licensees hoarding significant amounts of spectrum. In this latter regard, use of the 800 MHz band has progressed to the point where it may no longer be economically attractive for licensees to hoard spectrum in major metropolitan areas because of the substantial demand for trunked SMR service. We have had requests from trunked SMR system licensees who would like to assign their unused channels to other licensees who have congested systems but are unable to obtain more channels. Such requests are becoming more prevalent due to the shortage of 800 MHz trunked SMR channels and the increase in market competition. Approving such requests would appear to help expedite the movement of scarce trunked SMR channels to their highest valued use, thus improving overall spectrum efficiency in the public interest.

79. Based on the foregoing, we propose to eliminate our prohibition on partial assignments of 800 MHz authorizations. We invite specific comments on what impact, if any, this will have on the industry and whether it will be beneficial to licensees and end users.

VII. SMR End User Eligibility

80. We also wish to consider expansion of SMR end user eligibility. Presently, SMR licensees may only serve Part 90 eligibles. Generally speaking, a Part 90 eligible is anyone needing land mobile communications service in connection with a trade, business or other official activity. The Part 90 rule provisions exclude the federal government, foreign governments and their representatives and individual users from eligibility to use private land mobile spectrum.

81. The Part 90 eligibility rules developed in response to requests from various distinct groups of users who needed radio service to increase the efficiency of their operations. The first private land mobile radio users were members of the special emergency community – police, fire and rescue personnel – who needed private land mobile spectrum because they had unique communications needs that could not be served by common carriers. Because of the uniqueness of their operations, these entities also preferred to share spectrum with other compatible users rather than with members of the general public.

82. Over time, we received other requests for radio service from other groups of users with similar concerns, and the private land mobile radio service gradually expanded to accommodate the special communication needs of several different user groups. Most private radio licensees are engaged in business or service industries outside the communications field and use of radio is ancillary to their operations. For example, doctors use private paging services to communicate with their patients. Special emergency personnel use radios for crisis management. Businesses, small and large – from plumbers and taxicabs to oil rigging operations and multinational corporations – need these private radio systems to dispatch personnel and to run their businesses efficiently. These are only a few of the myriad of private radio uses and users.

83. The creation of the SMR service in 1974 was the first time we permitted entrepreneurial activity by Part 90 licensees. SMR licensees may only provide service, however, to users who are otherwise eligible to operate their own Part 90 radio facilities. Therefore, user demand for private spectrum was not increased by our decision to authorize SMRs. For the reasons that follow, we now think the public interest would be served by expanding SMR end user eligibility to include individuals and the federal government. The SMR service, unlike other pri-

vate land mobile services, is open to any private radio eligible. For this reason, the user compatibility concerns that led us initially to restrict eligibility for private spectrum are substantially diminished in the SMR pools, where a wide variety of SMR end users coexist simultaneously. Furthermore, because SMR licensees operate on a commercial basis, they are to some extent used to meeting the distinct needs of their diverse user clientele, and expanding the eligibility rules with respect to the SMR service is unlikely to change that.

84. Restricting SMR service to Part 90 eligibles also eliminates a potential option for individuals and federal government entities needing land mobile communications service. Presently, these parties must contract with cellular or radio common carrier operators for mobile radio service (federal government users also have access to government spectrum). These service providers, by virtue of their common carrier status, may not be able or permitted to meet specialized requirements of certain customers. SMR service also often can be obtained more quickly and less expensively than other services and can provide efficient radio transmission to individuals who previously could not obtain or afford radio service. This is particularly important in areas having limited telephone or domestic public land mobile service.

85. Our current exclusion of individuals from SMR systems also places SMR licensees at a competitive disadvantage relative to common carriers, which can serve a broader class of prospective customers. To the extent that SMR systems and radio common carriers serve the same customer base, a decision allowing SMR licensees to serve individuals would heighten competition in the market, possibly lowering prices and expanding consumer options. Finally, broadening individual user access to the SMR service might permit more intensive use of that spectrum in remote markets where it is not saturated. The public interest is disserved in these markets when those with mobile communications requirements face limited options and spectrum is idle simply because of restrictions against serving individual users contained in our rules.

86. Additionally, we believe that the exclusion of federal government entities from SMR systems no longer serves a useful purpose. The use of radio communications by the federal government has increased in recent years, causing it to seek alternative spectrum for its communications needs. Because the federal government does not have access to 800 MHz spectrum for its own use, it must seek service from radio common carriers if it desires to operate in that band. Recently, we have received waiver requests from federal government entities that want to be end users on SMR systems because the radio common carrier service was unavailable or inappropriate in the circumstances presented. We also have received waiver requests from SMR licensees that want to serve federal government entities as end users. We have granted some of these waivers to allow the federal government access to private radio spectrum when there are no available alternatives. Permitting them to be eligible as end users would increase their service options, and obviate the need for waiver requests.

87. Based on the considerations discussed above, we propose to expand the eligibility of SMR end users to include individuals and federal government agencies. However, this proposal does raise several issues that commenters should address. The first issue is whether such an expansion could alter the legal status of SMRs as private carriers. The SMR's classification as private carriers was originally based on the test of *NARUC I*.[89] However, in the Communications Amendments Act of 1982, Congress altered the test of common carriage in mobile radio. For private mobile radio services, defined in Section 3(gg) of the Communications Act as " . . . mobile services which provide a regularly interacting group of . . . stations . . . licensed on an individual, cooperative, or multiple basis . . . for private one-way or two-way land mobile radio communications by eligible users . . . ", the test became whether the service offering was interconnected and, if so, whether the service provider was reselling telephone exchange or interexchange service. Sections 3(gg) and 331(c)(1) of the Communications Act, 47 U.S.C. §§153(gg) and 332(c). It can be argued that those who resell telephone exchange or interexchange service to land mobile users are automatically classified as common carriers. Those who do not resell telephone exchange or interexchange service are classified as private carriers in this context.[90]

88. While Congress incorporated the concept of eligibility in the Communications Amendments Act of 1982, there is a question as to what significance it attached to the existing definition of "eligible users." Congress noted our continuing right "to add, modify or delete private land mobile radio services as the need arises, consistent with the guidelines specified in subsection 331(a)."[91] Congress' use of the term "private land mobile radio *services* " in this context may be synonymous with private land mobile radio *eligibles* because historically and practically the two concepts have been synonymous, *i. e.* special emergency users are eligible to use the special emergency service, and so forth. Therefore, modifying the SMR service to add new categories to private land mobile service for individual and federal government users in the SMR pools is an option that might be consistent with Congress' directive in §331(a)(3). That Section states that the Commission should " . . . provide services to the largest feasible number of users."

89. On the other hand, it may be argued that Congress expected some significant eligibility restrictions to remain basic to the private radio services. While very limited restrictions would still exist if we adopt this proposal, *i.e.*, foreign governments would still be barred from eligibility, only limited differences in eligible users of private carriers and common carriers (common carriers can service anyone) would exist. Therefore, we specifically request comment on whether this proposed change has any impact on the private carrier status of SMRs.

90. We recognize that our proposal may have certain adverse ramifications on established policies and private radio eligibles. Growth in the SMR service has exceeded our projections, and there are severe spectrum shortages in most major urban areas. Our proposal here would increase the number of potential SMR users in these markets, thereby increasing the strain on already saturated SMR systems and making it more difficult for traditional SMR end users to obtain service. We note, however, that SMR licensees have complete discretion over the end users they serve and, thus, are in a position to restrict access by individual users should their demand for service prove excessive or incompatible with traditional private radio users. In addition, the recent decision to allocate 200 additional SMR channels nationwide[92] will undoubtedly relieve some of the pressure on SMR systems, even in the largest markets.

91. We also realize that traditional private land mobile users may not want to share channels with individual users and the federal government. Historically, these users have been considered incompatible because their radio requirements are different, *i. e.*, private individuals use their radios for longer conversations than traditional users. It is difficult to judge the validity of this view without concrete evidence from those affected. We do note, however, that private radio users are now engaging in interconnected communications, which are also typically longer than dispatch messages, without apparent detriment to traditional users.[93]

92. We encourage comments on our proposal to allow individuals and government entities to be eligible as end users of both 800 MHz and 900 MHz SMR systems. Specifically, we ask commenters to address the following issues in detail: the current competitive disadvantages faced by SMR licensees due to eligibility restrictions and the competitive impact of expanding the field of potential users; the need for alternative communications systems by individual users and governmental entities; whether modification of SMR end user eligibility would increase the current spectrum shortage and impair traditional Part 90 eligibles' ability to meet their communications needs; and whether a modification in SMR end user eligibility would create future problems in defining private carrier operations. We also encourage commenters to include any other information relevant to this issue.

VIII. Technical Standards

93. As we discussed earlier in this proceeding, there are many differences between SMR systems and other traditional private radio systems. SMR systems are unique because they are the only private radio service specifically designed for entrepreunerial activities, and they have emerged as one of the most competitive and innovative services governed by the Commission. Because of the differences between the SMR service and other private land mobile services, we would like to consider allowing SMR licensees more flexibility in the technical plans for their systems. One area for which we would like to solicit comments is the use of non-standard channel widths and modulation schemes by SMR licensees without prior notification and approval. While SMR licensees are allowed great flexibility in using non-standard channel widths and modulation, they are required to submit justification and obtain prior approval from the Commission before implementing such non-conforming systems. 47 C.F.R. §90.645. As with our loading standards, this requirement was imposed to ensure maximum spectrum efficiency and to allow the greatest number of licensees on a finite amount of spectrum. We also required prior justification to accommodate possible interference concerns and to ensure that we were able to maintain an accurate data base to address any actual cases of interference. However, while the imposition of standard channel widths allows a greater number of licensees to be accommodated, it also may be at the expense of service quality and options. For example, in allocating the new 900 MHz spectrum, we adopted a channel width of 12.5 kHz, instead of 25 kHz as we have at 800 MHz. We chose to create a greater number of assignable channels despite the possibility of higher equipment costs and reduced communications quality. Additionally, the requirement of prior justifications or waivers could impose unnecessary delays on the business decisions of SMR licensees and preclude them from responding to market demands in a timely fashion.

94. We now propose and seek comments on allowing more flexibility to SMR licensees by permitting them to aggregate channel widths to offer different services and different service quality requiring greater bandwidth without prior approval. Since this additional flexibility could reduce the number of channels available, we are specifically interested in comments which address the benefits and costs of more intensive use of the spectrum versus the provision of higher quality communications service. Licensees who choose to use channel widths in excess of the standard channelling plan would be required to notify the Commission of their non-conforming systems.

95. Another area for which we would like to solicit comments is whether to allow licensees of 900 MHz SMR systems the flexibility to choose conventional or trunked technology without a waiver. SMR licensees in the 800 MHz band are allowed to choose between conventional and trunked technology. Therefore, SMR licensees in both the 800 MHz and 900 MHz bands would have the same flexibility in designing the technical parameters under which their systems will operate.

IX. Clarification of policies on for-profit service at 800 MHz

96. In recent years there has been some confusion in the industry as to whether, and under what circumstances, for-profit operation is allowed in private radio services other than the SMR services in the 800 MHz band. Most of the confusion concerning for-profit operations has been generated by one rule section concerning shared use of radio stations generally.[94] Section 90.179, by its terms, permits shared use on a for-profit basis and on a non-profit basis of Part 90 facilities. The rule on shared use was enacted in 1983 in a proceeding governing cooperative use and multiple licensing of stations in the private land mobile radio service below 800 MHz.[95] This proceeding permitted, among other things, for-profit sharing of systems licensed below 800 MHz,[96] in view of the changes made in the Communications Amendments Act of 1982.[97] In making this change we noted that for-profit use of private land mobile service facilities serves the public interest and that there should be minimal barriers to the way licensees, equipment suppliers and other third parties are able to offer facilities and service to eligible users in the private services. Our action in amending Section 90.179 was plainly meant to apply only to shared stations below 800 MHz, however, even though the 1982 Communications Act amendments apply to all private land mobile services.

97. This intention is further confirmed by an examination of Subparts M and S, which govern operation in the 800 MHz band. Both subparts state that they are to be read in conjunction with applicable requirements elsewhere stated in Part 90, but that in case of conflict Subparts M and S will govern with respect to licensing and operation in the 800 MHz band.[98] The rule sections governing eligibility in the 800 MHz band unambiguously provide that any person sharing service with a Part 90 eligible must do so on a non-profit, cost-shared basis.[99] The only persons permitted to share service for profit are those who are licensed on a commercial basis as SMR base station licensees.[100] Thus, while the literal language of Section 90.179 would appear to permit such operations

in the 800 MHz and 900 MHz bands outside the SMR pool, doing so would conflict with the specific provisions of Subparts M and S and is, therefore, prohibited.

98. Accordingly, we are revising Section 90.179 to make it clear that it applies only to systems operating below 800 MHz. The only licensees that are permitted to engage in for profit sharing above 800 MHz are SMR base station licensees.

Initial Regulatory Flexibility Analysis

99. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's initial analysis is as follows:

II. Objectives

100. The Commission proposes to amend its rules to merge Subpart M into Subpart S; to eliminate the enforcement of loading standards on trunked SMR systems; to create a unified regulatory process for the assignment of SMR frequencies; to permit partial assignments of constructed facilities; and to expand eligibility requirements for SMR end users. This action would allow access to SMR systems to a greater number of people; provide a consistent set of rules governing SMR systems; encourage SMR licensees to monitor and regulate their own industry; and create flexibility for SMR licensees to offer different types of communications systems.

III. Legal basis

101. The proposed action is authorized under Sections 4(i), 303(r) and 331(a) of the Communications Act of 1934, as amended.

IV. Reporting, recordkeeping and other compliance requirements

102. No new requirements will be imposed on licensees in the Private Land Mobile Radio Services.

V. Federal rules which overlap, duplicate or conflict with this rule

103. None.

VI. Description, potential impact, and number of small entities affected

104. The Commission expects this proposal to provide increased opportunities to current SMR licensees and to potential licensees. Although we believe it is too early to estimate the effect of the proposal, we anticipate that it would have a favorable impact on small entities. The proposal to eliminate loading standards would permit small SMR entities to compete with large SMR entities on a more equal basis and the proposal to modify end user eligibility requirements would allow small SMR entities to provide service to a larger number of end users. Small end user entities would also benefit from the increased number of services that could be offered by SMR licensees. However, the Commission also notes that the proposal to expand eligibility of SMR end users will place a greater strain on the SMR market, due to the increased number of end users who may seek SMR service. This would also possibly increase the number of non-traditional private radio end users served by SMR licensees. While this may benefit those entities not currently eligible for SMR service, it could be detrimental to small, traditional private radio end users who will be subject to more competition in obtaining SMR service. Also, the proposal to eliminate loading standards for SMR trunked systems could result in an increase in interconnected service. An increase in the use of interconnection could result in less end users being able to obtain service from SMR licensees or in end users having less access to the channels they are authorized to use.

VII. Significant alternatives

105. There are no significant alternatives besides those considered in this *Notice of Proposed Rule Making*.

Paperwork Reduction Act Statement

106. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase and may decrease burden hours imposed on the public.

Procedural Matters

107. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/ pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding, must prepare a written summary of that presentation. On the day of that oral presentation, a written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules, 47 C.F.R. §.1231.

108. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r). Interested persons may file comments on or before January 30, 1987, and reply comments on or before March 13, 1987. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the report and order. 109. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. §1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public

who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C. 20554.

110. For further information concerning this rule making contact Nia Chirigos Cresham, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554 (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 90 of Chapter I of the Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303 unless otherwise noted.

2. Section 90.179 is amended by revising the section heading and introductory paragraph to read as follows:

§90.179 Shared use of radio stations in the frequency bands below 800 MHz.

Licensees of radio stations below 800 MHz authorized under this rule part may share the use of their facilities. A station is shared when persons not licensed for the station control the station for their own purposes pursuant to the licensee's authorization. Shared use of a radio station below 800 MHz may be either on a non-profit, cost-shared basis or on a for-profit private carrier basis. Shared use of an authorized station below 800 MHz is subject to the following conditions and limitations:

* * * * *

3. Subpart M (Sections 90.350 through 90.390) is removed in its entirety and the word "Reserved" substituted.

Subpart M (Reserved)

4. Section 90.601 is revised to read as follows:

§90.601 Scope.

This subpart sets out the regulations governing the licensing and operations of all systems operating in the 806-821/851-866 MHz and 896-901/935-940 MHz bands. This subpart also governs the use of frequencies in the 806-821/851-866 MHz bands along the Mexican and Canadian border areas in accordance with existing agreements. It includes eligibility requirements, application procedures, operational and technical standards for stations licensed in these bands. The rules in this subpart are to be read in conjunction with the applicable requirements contained elsewhere in this part; however, in case of conflict, the provisions of this subpart shall govern with respect to licensing and operation in these frequency bands.

5. Section 90.603 is amended by revising paragraph (c) to read as follows:

§90.603 Eligibility

* * * * *

(c) Any person, except wire line telephone common carriers, eligible under this part and proposing to provide on a commerical basis base station and ancillary facilities for the use of individuals, federal government and persons eligible for licensing under Subparts B, C, D, or E of this part.

6. Section 90.609 is amended by removing paragraph (c).

7. Section 90.611 is amended by revising paragraphs (b) and (c) to read as follows:

§90.611 Processing of applications

* * * * *

(b) All applications in pending status will be processed in the order in which they are received, determined by the date on which the application was received by the Commission in its Gettysburg, PA office.

(c) Each application will then be reviewed to determine whether it can be granted. Frequencies must be specified by applicants in the Public Safety/Special Emergency, Industrial/Land Transportation and Business categories, and by SMR applicants for conventional channels pursuant to the provisions of §90.621. SMR applicants for trunked frequencies may select their frequencies pursuant to §90.621 or request the Commission to select frequencies. Frequencies will be selected in accordance with the Commission's assignment policies and loading criteria. If the application cannot be granted due to a lack of available frequencies, the application will be placed in queue on a waiting list. When frequencies become available they will be assigned to the highest ranking applicant which is eligible to use them based on the site specified, the Commission's mileage separation standards, and other applicable standards.

* * * * *

8. Section 90.617 is amended by revising paragraph (d), amending Table 4 by revising the entry for Group No. 228 and adding new entries for Group Nos. 401-440, and adding a new Table 4A to read as follows:

* * * * *

(d) The channels listed in Tables 4 and 4A are available only for eligibles in the SMR category which consists of Specialized Mobile Radio (SMR) stations and eligible end users. SMR stations are assigned a frequency 45 MHz higher. This paragraph deals with the assignment of frequencies only in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87 miles) from the U.S./Canada border. See Section 90.619 for the assignment of SMR frequencies in these border areas. Channels 401-600 are available only for trunked operations. For stations located within 70 miles of Chicago channels 401-600 will be assigned in groups as outlined on Table 4A.

* * * * *

Table 4 - SMR Category

806 - 821/851 - 866 MHz Band Channels (280 channels)

Group No.	Channel Nos.
228	228-268-308-348-388
401	401-441-481-521-561
402	402-442-482-522-562
403	403-443-483-523-563
404	404-444-484-524-564
405	405-445-485-525-565
406	406-446-486-526-566
407	407-447-487-527-567
408	408-448-488-528-568
409	409-449-489-529-569
410	410-450-490-530-570
411	411-451-491-531-571
412	412-452-492-532-572
413	413-453-493-533-573
414	414-454-494-534-574
415	415-455-495-535-575
416	416-456-496-536-576
417	417-457-497-537-577
418	418-458-498-538-578
419	419-459-499-539-579
420	420-460-500-540-580
421	421-461-501-541-581
422	422-462-502-542-582
423	423-463-503-543-583
424	424-464-504-544-584
425	425-465-505-545-585
426	426-466-506-546-586
427	427-467-507-547-587
428	428-468-508-548-588
429	429-469-509-549-589
430	430-470-510-550-590
431	431-471-511-551-591
432	432-472-512-552-592
433	433-473-513-553-593
434	434-474-514-554-594
435	435-475-515-555-595
436	436-476-516-556-596
437	437-477-517-557-597
438	438-478-518-558-598
439	439-479-519-559-599
440	440-480-520-560-600

Table 4A
SMR Category
Chicago Plan [2,3]

Group No.	Channel Nos.
401[1]	401-410
411	411-447-483-519-555
412	412-448-484-520-556
413	413-449-485-521-557
414	414-450-486-522-558
415	415-451-487-523-559
416	416-452-488-524-560
417	417-453-489-525-561
418	418-454-490-526-562
419	419-455-491-527-563
420	420-456-492-528-564
421	421-457-493-529-565
422	422-458-494-530-566
423	423-459-495-531-567
424	424-460-496-532-568
425	425-461-497-533-569
426	426-462-498-534-570
427	427-463-499-535-571
428	428-464-500-536-572
429	429-465-501-537-573
430	430-466-502-538-574
431	431-467-503-539-575
432	432-468-504-540-576
433	433-469-505-541-577
434	434-470-506-542-578
435	435-471-507-543-579
436	436-472-508-544-580
437	437-473-509-545-581
438	438-474-510-546-582
439	439-475-511-547-583
440	440-476-512-548-584
441	441-477-513-549-585
442	442-478-514-550-586
443	443-479-515-551-587
444	444-480-516-552-588
445	445-481-517-553-589
446	446-482-518-554-590
591	591-592-593-594-595
596	596-597-598-599-600

* * * * *

9. Section 90.631 is amended by revising the section heading as follows, and removing paragraphs (a) and (b) and renumbering paragraphs (c) as (a), (d) as (b), (e) as (c) and (f) as (d).

§90.631 Trunked systems construction and authorization requirements.

* * * * *

APPENDIX FOOTNOTES

[1] Reserved for contiguous assignments or as a frequency pool for assignments to systems with odd number of channels.

[2] These frequencies will be authorized only in the area encompassed by a 70 mile radius centered at 41°52'28" N, 87°38'22" W.

[3] All stations located beyond the 70 mile distance authorized on or before August 16, 1982 to use these frequencies may continue to do so. Stations beyond the 70 mile distance authorized after August 16, 1982 shall employ frequencies listed in Table 4 subject to the provisions of §90.621 (b) or (c) as applicable.

FOOTNOTES

[1] The term 800 MHz spectrum is used in this document to refer to all spectrum in the 806-821 MHz and 851-866 MHz bands. The 896-901 MHz and 935-940 MHz bands is referred to as the 900 MHz band.

[2] The SMR service was established in 1974. Licensees in the SMR service provide land mobile communications on a commercial basis to entities eligible for licenses under Part 90. The development of the SMR service is discussed at greater length, *infra See Notice of Proposed Rule Making and Notice of Inquiry*, Docket No. 18262, 33 Fed. Reg. 10,807 (July 30, 1968); *First Report and Order and Second Notice of Inquiry*, Docket No. 18262, 35 Fed. Reg. 8,644 (June 4, 1970).

[4] *See Second Report and Order*, Docket No. 18262, 46 FCC 2d 752 (1974); *Memorandum Opinion and Order*, Docket No. 18262, 51 FCC 2d 945 (1975); *aff' d, National Ass' n of Regulatory Comm' rs v. FCC*, 525 F. 2d 630 (D.C. Cir), *cert. denied*, 425 U.S. 992 (1976). The remaining 45 megahertz was placed in reserve for later land mobile use.

[5] Trunking is a mode of operation in which a number of channels are assigned to base and mobile stations as a group and commonly shared by users of the system. This is in contrast to conventional operation, in which a user is assigned, or has available, one particular channel. While trunking is a more efficient way of utilizing channels, certain requirements of individual users may more readily be satisfied by conventional channels.

[6] *See Order* Docket No. 18262, 43 Fed. Reg. 35,394 (August 9, 1978). We also increased mobile loading standards for conventional channels in the top 25 urban areas. *See Memorandum Opinion and Order*, Docket No. 79-106, 44 Fed. Reg. 35,394 (August 9, 1979).

[7] *See Second Report and Order*, Docket No. 79-191, 90 FCC 2d 1281 (1982); 47 Fed. Reg. 41,002 (September 16, 1982).

[8] For ease of discussion, the 350 channels released before 1979, are sometimes referred to as the "old" channels whereas the channels later released are referred to as the "new" channels.

[9] For a fuller discussion of our loading policies, *see* Section III- Loading Standards, *infra*.

[10] *Second Report and Order*, Docket No. 79-191, at paragraph 113, footnote 78, page 37; 47 C.F.R. §§90.360, 90.611. The elimination of Subpart M, and revision of Subpart S, are the subject of this proceeding.

[11] *Second Report and Order*, Docket No. 18262, paras. 29, 30, 31 and 35. This service was still governed by the private radio rules because of the application of certain conditions, such as eligibility and permissible communications. Eligibility to use private systems is based on whether an entity is engaged in activities related to business, public safety/special emergency, industrial, land transportation or radiolocation services. Actual use is, with exceptions, restricted to communications related to the activity which formed the basis for eligibility. Regarding these exceptions, *see Report and Order* in PR Docket 84-109, 50 Fed. Reg. 6,179 (1985).

[12] Memorandum Opinion and Order, Docket No. 18262, 51 FCC 945 (1975), at paras. 49 and 62.

[13] All but one of the applicants currently on the waiting lists for trunked channels are requesting SMR licenses.

[14] For further discussion see Section V - Processing and Assignment Procedures, infra.

[15] For further discussion of our channel recovery program, see Section III - Loading Standards, infra.

[16] See Report and Order in Gen. Dockets 84-1231, 84-1233 and 84-1234, adopted July 24, 1986.

[17] See generally, Notice of Proposed Rule Making,Docket No. 18261, 14 FCC 2d 297 (1968); First Report and Order, Docket No. 18261, 23 FCC 2d 325 (1970).

[18] The pools consisted of the following groups: Public Safety, Utility, Special Industrial, Business, Taxicabs, Land Transportation, Petroleum-Manufacturers, and Domestic Public Radio. Notice of Further Proposed Rule making. Docket No. 18261, 27 FCC 2d 371 (1971), 36 Fed. Reg. 2,407 (Feb. 4, 1971), at para. 8.

[19] Notice of Further Proposed Rule making, Docket No. 18261, supra, at paras. 13 and 14.

[20] Second Report and Order, Docket No. 18261, 30 FCC 2d 221 (1971), at paras. 9 and 10.

[21] Id.

[22] Id. at para. 12.

[23] Second Report and Order, Docket No. 18262, supra, at para. 13.

[24] See Second Report and Order, Docket No. 18262, supra.

[25] Id. at para. 79. Conventional channels also received a protected geographic area once they achieved minimum loading standards.

[26] In response to petitions for reconsideration of the Second Report and Order in Docket No. 18262, we rejected proposals that we review SMR applicants' financial qualifications, noting that the future performance of SMR licensees would be ensured by mandating construction and loading requirements.

[27] Second Report and Order, Docket No. 18262, supra, at para. 85.

[28] For a detailed discussion of our allocation proceedings in the 800 MHz band, see Section II - Background, supra.

[29] We made all existing and future conventional systems subject to the new rules in Subpart S of Part 90. Only the 200 trunked channels allocated in Docket No. 18262 are still governed by Subpart M of Part 90. Systems licensed on the 200 trunked channels were allowed to operate under Subpart M for five years. As noted earlier, we scheduled the merger of Subparts M and S for September 1, 1987.

[30] See 47 C.F.R. §90.633. Trunked systems governed by Section 90.366 of Subpart M must be loaded to 70 mobiles per channel within 5 years of authorization.

[31] The unloaded channels are recovered through the Private Radio Bureau's channel recovery program and are reassigned to other applicants.

[32] See Second Report and Order, Docket No. 79-191,supra, at paras. 112 and 113.

[33] See Memorandum Opinion and Order, Docket No. 79-191, 95 FCC 2d 477 (1983), at para. 11.

[34] Id. at paras. 13 and 14. See 47 C.F.R. §§90.364 and 90.366 of Subpart M and 47 C.F.R. §90.627 of Subpart S.

[35] Id. at para. 15. We have received a recent petition on this issue that will be discussed infra, paras. 25 and 26.

[36] Docket No. 18262 and Docket No. 79-191. See Section II - Background, supra.

[37] See Section V - Processing and Assignment Procedures, infra.

[38] *See Notice of Inquiry and Notice of Proposed Rule Making*, Docket No. 20846, 41 Fed. Reg. 28,540 (July 12, 1976); *First Report and Order*, Docket No. 20846, 69 FCC 2d 1831 (1978); 43 Fed. Reg. 38,396 (August 28, 1978); *Second Report and Order*, Docket No. 20846, 89 FCC 2d 741 (1982); *Memorandum Opinion and Order*, Docket No. 20846, 48 Fed. Reg. 29,512 (June 27, 1983); *Notice of Proposed Rule Making*, Docket No. 84-414, 49 Fed. Reg. 25,255 (June 20, 1984); *Report and Order*, Docket 84-414, 50 Fed. Reg. 15,148 (April 17, 1985).

[39] Petition for Rule Making in the Matter of Modification of FCC Rule Sections 90.364 and 90.627 Governing Trunked Specialized Mobile Radio Service System Requirements in Rural Markets, RM No. 5153, filed August 26, 1985 by the American SMR Network Association (ASNA). ASNA is a trade association comprised of SMR licensees.

[40] The loading rules do not permit trunked system licensees to obtain another trunked system within 40 miles of an existing system, unless the existing system is loaded to 80 mobile units per channel. *See* 47 C.F.R. §90.364 of Subpart M and 47 C.F.R. §90.627 of Subpart S.

[41] For instance, ASNA suggests that we allow the licensee of a five channel trunked system to obtain an additional five channels after building the original system, rather than requiring that the original system be fully loaded prior to expansion. ASNA would not permit further expansion of the new ten channel system until at least five channels have been loaded to 80 percent capacity.

[42] Motorola, Inc. is a major manufacturer of land mobile radio equipment and is also licensee of SMR systems. NABER is an association comprised primarily of business radio licensees and users. A section of NABER represents SMR licensees.

[43] *Future Private Land Mobile Telecommunications Requirement* : Final Report, Planning Staff, Private Radio Bureau, Federal Communications Commission, Washington, D.C., August 1983.

[44] *Report and Order*, Gen. Docket Nos. 84-1231, 84-1233 and 84-1234, *supra*.

[45] We originally developed loading standards to test theories on the efficiency of trunked technology. *Second Report and Order*, Docket No. 18262, *supra*., at para. 94.

[46] In the 900 MHz band, SMR licensees can initially obtain ten channels. *See Report and Order* in Gen Docket Nos. 84-1231, 84-1233 and 84-1234, *supra*.

[47] We recently issued a *Notice of Proposed Rule Making* Docket No. 86-78, 51 Fed. Reg. 9,853 (March 21, 1986), in response to a request from the American SMR Network Association (ASNA) proposing that we allow secondary fixed tone signalling and alarm operations by end users of trunked SMR systems.

[48] *See* 47 C.F.R. §§90.366 and 90.631 (establishing three and five year standards).

[49] SMR licensees are permitted to assign their licenses for trunked radio systems only after building an authorized facility. *See* 47 C.F.R. §90.358 of Subpart M and 47 C.F.R. §90.609 of Subpart S.

[50] The use of loading standards requires that we maintain updated loading records for all licensees. This information must be changed constantly and verified by licensee certification letters. Also, any channels recovered must be noted in our records. We verify all loading information before recovering channels. We also must allow 30 days for reconsideration of each recovery action and act on any reconsideration requests. For reassignments of recovered channels in the new SMR channels we must conduct comparative analyses and lotteries. For waiting list applicants, claiming a preference, we must verify all loading information.

[51] *See* 47 C.F.R. §90.155, 47 C.F.R. §90.358 of Subpart M and 47 C.F.R. §90.609 of Subpart S.

[52] Even if we repeal loading generally, we will still occasionally recover SMR channels because of failure to construct, voluntary return and licensee rule and Communications Act violations.

[53] This would be similar to the preference we assign to fully loaded trunked applicants on the waiting list. See 47 C.F.R. §90.360(c).

[54] This would be similar to our comparative point system for the lotteries, see Memorandum Opinion and Order, Docket No. 79-191,supra.

[55] Notice of Proposed Rule Making, Docket No. 86-160, FCC 86-213, (released May 8, 1986).

[56] Of course, it is in the most congested markets that competition is stiffest and channel underutilization occurs least often.

[57] See supra, paras. 26 and 27.

[58] See Background section, supra. The 200 trunked channels are governed by Subpart M and and the 100 conventional channels are governed by Subpart S. In 1978, we allocated an additional 50 channels for conventional use. These channels are also governed by Subpart S. See Order, Docket No. 18262, 43 Fed. Reg. 35,394 (August 9, 1978).

[59] When we released the 250 reserve channels in 1982, we allocated them by service pools rather than by technology in response to an industry request. Most of the 200 trunked channels released in 1974 had been obtained by SMR licensees in the major urban areas. Licensees and representatives from other traditional private radio services requested that we allocate the 250 reserve channels into service pools so that the non-commercial users could expand into the spectrum at their own pace without the risk of all available channels being assigned to SMR systems. Accordingly, we allocated 70 channels for Public Safety, 50 channels for Industrial/Land Transportation, 50 channels for Business and 80 channels for SMR systems. However, we provided for interpool sharing among the 3 non-commercial pools 18 months after the release of the Second Report and Order, in Docket No. 79-191. See 47 C.F.R. §90.621(g).

[60] 47 C.F.R. §§90.611(c) and 90.621(a).

[61] The rules governing processing and assignment of these channels are in Subpart M, 47 C.F.R. §90.360.

[62] *See Second Report and Order* in Docket No. 18262, *supra*, at para. 8.

[63] *See Report and Order*, Docket No. 85-6, 50 Fed. Reg. 32,419 (August 12, 1985). Applicants must load their systems to 80 mobile units per channel before they will be assigned additional channels. 47 C.F.R. §90.366(c).

[64] The assignments are based on the applicant's rank on the waiting list, channel loading, the site specified, the Commission's mileage separation standards and other applicable standards. 47 C.F.R. §90.360(c).

[65] When channels are recovered from a trunked licensee pursuant to 47 C.F.R. §§90.366 and 90.631, the old license is cancelled and a new license is issued for the reduced number of channels.

[66] The rules governing processing and assignment of these channels are in Subpart S, 47 C.F.R. §90.611.

[67] *See Second Report and Order*, Docket No. 79-191, *supra* at paras. 205, 206 and 207. Our decision to open a filing window for these new channels, rather than to award them to applicants on existing waiting lists for the old trunked channels, was challenged by the National Mobile Radio Association (NMRA). NMRA contended that this decision prejudiced entities with applications already pending for trunked SMR systems and that those applicants should have priority for the new channels. We denied NMRA's arguments in our *Memorandum Opinion and Order* in Docket No. 79-191, out of concern that the approach advocated by NMRA would discourage new applicants from filing for the new channels. Four years have passed since the release of the new channels, and we no longer feel that it is necessarily in the public interest to maintain a bifurcated processing procedure. SMR channels are saturated in many areas. In many cases, these SMR systems are run by those licensees new to the industry in 1982. Thus, our initial concern that a unified procedure would handicap newcomers is no longer pertinent in this spectrum band.

[68] Public Notice 3526, released on April 11, 1983.

[69] We apply these procedures now when we make reassignments of recovered channels governed by Subpart S. *See* Public Notice 1805, released January 6, 1986.

[70] *See Second Report and Order*, Docket No. 79-191, *supra* at paras. 208 and 209; *Memorandum Opinion and Order*, Docket 79-191, *supra*, at para. 36. When analyzing the merits of applicants for SMR channels in lottery areas, we award one comparative point for applicants proposing trunked systems and one comparative point for applicants proposing to expand fully loaded existing trunked systems. Therefore, each applicant receives two points, one point or no points.

[71] *Report and Order*, Docket No. 85-6, 50 Fed. Reg. 32,419 (August 12, 1985).

[72] The petitioners and commenters asked also that we initiate a waiting list and preferences for the 250 channels governed by Subpart S and combine it with the waiting list under Subpart M. Although we declined to act on this request at that time, we are proposing the use of a unified waiting list for all 800 MHz channels now. The use of preferences will depend on our final decision on the use of loading standards.

[73] *Second Report and Order*, Docket No. 79-191, *supra*.

[74] *See* 47 C.F.R. 90.155; 47 C.F.R. 90.366(d) and (g) of Subpart M; 47 C.F.R. 90.629 and 90.631(c) of Subpart S.

[75] Public Notice 1805, released January 6, 1986. This public notice reiterated our processing procedures for the 250 channels released by the *Second Report and Order* in Docket No. 79-191 and explained our procedures for notifying applicants of filing dates for recovered channels.

[76] If applications are filed before the specified date, they are dismissed because the channels are not available. Once the channels are available, the first application filed on that date, or any later date, starts the one day window. All applications filed during the one day window are treated the same and if there are not enough channels available to grant all of them, they

require comparative analysis and possibly a lottery. Any applications filed after the one day window has closed are dismissed.

[77] In the seven months since we revised the window procedure, we have received over 1600 applications for 66 channel blocks. Before these public notices we received an average of 100 SMR applications a month.

[78] Our first public notice releasing channels was in early February. We now have approximately 20 lotteries in process.

[79] This issue was dealt with in our Public Notice 3467, released March 28, 1986. There we stated that applicants will be given only one chance for a 5 channel group in each lottery.

[80] *See also* Public Notice 3570, April 4, 1986, section IV, where we stated that applicants are not permited to file multiple applications for "old" channels and "new" channels with sites located within 40 miles of each other. However, licensees with unloaded 800 MHz systems are allowed to apply for 900 MHz channels in the same market area. *See Report and Order*, Docket Nos. 84-1231, 84-1233 and 84-1234, *supra*.

[81] Applicants are permitted to file separate applications for channel blocks in the same area that are released in separate lotteries. If an applicant wins a grant for a channel block in an area, his or her applications for channel blocks in the same area will be dismissed in later lotteries. Applicants must notify the Licensing Division of multiple filings at the same location for channel blocks subject to different lotteries.

[82] Public Notice 3570, *supra* at Section V.

[83] *See* Section V - Transfer of Subpart M Trunked Channels to SMR Pool, *supra*.

[84] We will also use waiting lists for the new 900 MHz SMR spectrum. However, separate waiting lists will be developed for these channels because current technology does not permit a single system to operate with the old and new 800 MHz spectrum as well as the 900 MHz spectrum.

[85] *See* 47 C.F.R. §§90.360 of Subpart M for waiting list procedures.

[86] *See* 47 C.F.R. §90.360.

[87] *See* 47 C.F.R. 90.358 of Subpart M and 47 C.F.R. 90.609 of Subpart S.

[88] *Second Report and Order, Docket No. 18262, supra,* at paras. 63 through 66.

[89] *National Association of Regulatory Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 999 (1976). The court in *NARUC I* found SMRs to be private carriers because they establish medium-to-long term contracts with a relatively stable clientele; tailor offerings to the special requirements of each customer; and negotiate each contract individually. SMRs therefore are neither holding themselves out as common carriers, nor are they required to do so by law.

[90] *See Conference Report* No. 97-765, 97th Cong., 2nd Sess., pages 55 and 56, August 18, 1982. The Commission's interpretation and application of Section 331(c) to private radio systems has been upheld by the Court of Appeals in two separate cases. *See Telocator Network of America v. FCC*, 761 F.2d 763 (D.C. Cir. 1985), and *Telocator Network of America v. FCC*, 764 F.2d 926 (D.C. Cir. 1985).

[91] *See Conference Report, supra,* at page 54.

[92] *Report and Order, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, supra.*

[93] Licensees on shared channels are required to obtain consent from all affected co-channel users prior to use of interconnected communications. *See* 47 C.F.R. §90.477. However, licensees on exclusive channels have discretion over whether to use interconnected communications. For instance, SMR base station licensees can decide whether to offer interconnected service, which end users can obtain the service, and how end users can use the service.

[94] 47 C.F.R. §90.179. We granted a waiver of §90.179 in 1984, to permit an 800 MHz system owned by IBM to share its excess capacity on a for-profit basis. However, IBM was required to meet the unique requirements for waiver under 47 C.F.R. §90.151 before we permitted the for-profit sharing.

[95] *Memorandum Opinion and Order, Docket No. 18921,* 48 Fed. Reg. 26,617 (June 9, 1983).

[96] *Id.* at paras. 5 and 19.

[97] 47 U.S.C. §332.

[98] *See* 47 C.F.R. §90.350 of Subpart M and §90.601 of Subpart S.

[99] *See* 47 C.F.R. §90.352(b) of Subpart M and §90.603(b) of Subpart S.

[100] *See* 47 C.F.R. §90.352(c) of Subpart M and §90.603(c) of Subpart S.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO DISSENTING-IN-PART

Re: Notice of Proposed Rule Making to amend Part 90, Subparts M and S, and to modify policies concerning Specialized Mobile Radio (SMR) Service.

My dissent is rather straightforward. I dissent to that aspect of the Notice of Proposed Rule Making addressing technical proposals for Specialized Mobile Radio (SMR) services. Specifically, I object to the proposals that: 1) permit the use of non-standard channel widths and modulations without prior notification and Commission approval; 2) permit the aggregation of channel widths without Commission approval; and 3) permit licensees to choose between conventional or trunked systems for SMR services.

It is a bleak day in the realm of public policy formulation when just three weeks after the Commission released its *Report and Order* allocating spectrum in the 800-900 MHz bands, the majority proposes to do an about-face.[1] Action by the majority today proposes to allow SMR licensees more flexibility by aggregating channels to offer different services and different service quality requiring greater bandwidths than the 12.5 kHz channeling plan adopted in the reserve proceedings. Such proposed action could reduce the number of SMR channels available. The rationale for the 12.5 kHz channeling plan and the requirement for spectrum-efficient technology was to create more channels, not less, to meet the current needs and growing demands of the Private Land Mobile Radio community.

When adopting the channeling plan for the Private Land Mobile Radio Services, the Commission stated:

> Foremost in our decision on a channeling plan for this allocation is the need to consider the evidence concerning Private land mobile spectrum needs. As previously discussed, the substantial shortfalls in available communications capacity within the next decade that were projected by our own studies have been affirmed by the comments in this proceeding and supported by the actual growth rates . . . in balancing the divergent goals of spectrum efficiency and high communications quality, we are compelled to give greater weight to the spectrum efficiency issue in the channel selection process. In view of these considerations, we are adopting a 12.5 kHz channeling plan with technical flexibility for the 896-901 MHz and 935-940 MHz bands.[2] (Emphasis added)

After reviewing the comments addressing alternative channeling plans, the Commission in noting the shortfall of spectrum essential to meeting the needs of the Private Land Mobile Radio services, decided on the 12.5 kHz channeling plan. By today's action, however, the majority is proposing to abandon its rationale for selecting the 12.5 kHz channeling plan. It now appears that the majority would like to have it both ways. First, the majority relies upon the rationale of spectrum demand for requiring the 12.5 kHz channeling plan, trunked technology and the filing of waivers for other spectrum efficient technologies. Now, however, the majority proposes to rely on licensees' interest in developing "quality" SMR services that may be more socially or economically efficient, not necessarily spectrum efficient, and to do this without requiring licensees to seek waiver requests. In my opinion, the majority can't have it both ways. The proposals for less spectrum efficient technology and wider bandwidths for SMR services are based on factors other than spectrum efficiency and include such notions as "quality" of service and "options" available to users. Such notions were reviewed and rejected outright by the Commission in its earlier allocation decision requiring a 12.5 kHz channeling plan and trunked technology for SMR services.[3]

The bottom line of today's technical proposals is the abandonment of the Commission's decision to ensure spectrum-efficient technology in the SMR services. Spectrum efficiency will give way to whatever SMR licensees wish to provide and coupled with the proposals to eliminate the requirement to file waiver requests and loading requirements, we will never accurately know how SMR spectrum is being used. I find such a situation intolerable in light of the record indicating significant demand for SMR spectrum.

The more glaring example of contradiction in public policy, however, is the proposal to permit licensees of the 900 MHz SMR systems the flexibility to choose between conventional and trunked technology without the requirement of filing a waiver request. When allocating the reserve spectrum in July, the Commission stated "[t]o further enhance efficient utilization of this spectrum, we have decided to require the use of trunking on all channels in the SMR pool." The majority also stated that waivers of the trunking requirement "will be considered on a case-by-case basis for operational configurations that can clearly be demonstrated to be at least as efficient as trunking."[4] The proposal to allow licensees the option of choosing conventional or trunked systems is blatantly inconsistent with our action in the reserve proceeding released just three weeks ago. I find such a proposal an affront to the reasoning and logic so extensively relied upon by the majority in that proceeding. The Commission went to great lengths to justify the significant amount of spectrum given to the Private Land Mobile Radio services by arguing the existence of a tremendous unmet demand for spectrum. To remedy the plight of the Private Land Mobile Radio Services, the Commission not only allocated 10 MHz of spectrum, but also required trunking on all channels in the SMR services. Now, just three weeks after releasing the *Report and Order* in that proceeding, the majority seeks to undermine its rationale for allocating spectrum by proposing to allow conventional SMR systems and furthermore, to do so without requiring licensees to seek a waiver.

Finally, a few words must be said about the waiver process in light of the technical flexibility now proposed by the majority. In the reserve proceedings, technical flexibility for the new 900 MHz channels referred to the flexibility to use more than a single emission within a channel, or upon justification, to combine contiguous channels.[5] Yet, by adopting this *Notice of Proposed Rulemaking* , the majority is proposing rule changes under the guise of technical flexibility" that are clearly contrary to the recently adopted rules allocating the 900 MHz channels for SMR services. Those recently adopted rules specifically required waivers to be submitted in the event that licensees seek to propose alternative spectrum-efficient technology. This waiver process allows the Commission to determine if the proposed technology is

consistent with our goal of spectrum efficient technology. Apparently, under the proposed rule changes the majority no longer finds a compelling interest to ensure that valued spectrum is used in the most efficient manner available.

Although I am not dissenting to the proposals to eliminate some of the eligibility requirements for SMR licensees, and the loading requirements, I would like to draw public attention to some of my concerns with these proposals. By proposing to eliminate many of the eligibility requirements, is the Commission proposing to destroy the distinctions between private carriers and common carriers?

Regarding loading requirements, the Commission currently has reclaimed 1382 SMR channels due to the failure to meet loading requirements.[6] Furthermore, these channels were reclaimed in the 21 largest U.S. cities where waiting lists exist for SMR channels. This indicates that there is a real value to maintaining the current loading requirements. In the absence of loading requirements how will the Commission know that these channels remain fallow? I will be reviewing carefully the comments addressing this question and other aspects of the proposal to eliminate the loading requirement.

Finally, by proposing to allow the federal government to be an end user in SMR services, we are proposing to increase the demand for SMR services. The *Notice of Proposed Rulemaking* provides no estimates of the increased demand for SMR channels due to federal government use. I believe that such information would be valuable prior to making our final determination on this proposal. How one justifies increasing the number of eligibles for SMR services in light of our recent action allocating additional spectrum to SMR services to meet existing needs of current SMR eligibles remains unclear. Furthermore, the narrower 12.5 kHz channeling plan and the requirement of trunked technology were implemented to help ease the existing demand for SMR spectrum. Now, to propose to increase the demand for SMR channels, while also proposing to eliminate the requirements for spectrum-efficient technology and loading, coupled with decreasing the number of SMR channels due to the proposal to permit increased bandwidths, appears to be a contradiction in purpose and goal of our public policy. Such contradictions work against SMR interests in future spectrum related proceedings.

FOOTNOTES
Commissioner Quello's Statement

[1] *See, Report and Order* in General Docket Nos. 84-1231, 84-1233, and 84-1234, 51 Fed. Reg. 37398 (October 22, 1986).

[2] *Ibid.* See paragraph 69.

[3] *Ibid.*

[4] *Ibid.* See paragraph 75.

[5] *Ibid.* See paragraph 77.

[6] The Commission has reclaimed 2224 SMR channels. This figure represents 62% of all reclaimed SMR channels. The remaining 842 (38%) SMR channels have been reclaimed due to construction failures.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-97

In the Matter of

THE WESTERN UNION
TELEGRAPH CO.

Phase I
Revisions to Tariff F.C.C. Nos. 240
and 258 Filed with Transmittal No. 7346;
Revisions to Tariff F.C.C. Nos. 268 and
269 Filed with Transmittal Nos. 7347 and
7348; Revisions to Tariff F.C.C. Nos.
229, 240, 254, 255, 258, 260, 263 and
268 Filed with Transmittal No. 7417

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 13, 1986; Released: December 1, 1986

By the Commission: Commissioner Dennis not participating.

Table of Contents

	Paragraphs
I. Introduction	1
II. Background	2-12
A. Initiation of CC Docket No. 78-97 Investigation	2-4
B. Rejection of Proposed Rate Agreement; Rejection of Discount	5-8
C. Phase I Reimbursement Order	9-12
III. Discussion	13-60
A. Procedural Issues	13-14
B. The "Rate Hiatus"	15-23
C. Retroactive Rate Prescriptions	24-45
1. Authority Under Section 222(e) of the Communications Act	25-38
2. Authority Under Other Sections of the Communications Act	39-45
D. Arguments in Equity	46-59
1. Quantum Meruit	47-48
2. ICP Conduct	49-51
3. Equitable Estoppel; Detrimental Reliance	52-54
4. Consistency with Other Commission Actions	55-56
5. Mootness	57
6. Assignment and Computation of Interest	58-59
IV. Conclusion; Ordering Clauses	60-65

I. INTRODUCTION

1. On August 19, 1985, we released an Order[1] granting in part a petition by the Western Union Telegraph Company (WU) to be reimbursed for payments withheld by various interconnected record carrier customers during a dispute over appropriate rates for telex/TWX service. The affected interconnected carriers (interconnected carrier parties or ICPs)[2] subsequently filed petitions for reconsideration of that Order. For reasons discussed below, these petitions are denied.

II. BACKGROUND

A. *Initiation of CC Docket No. 78- 97 Investigation*

2. An extensive history of the dealings between WU and the ICPs is provided in the *Phase1 Reimbursement Order* and will not be repeated here. The dispute at the center of this proceeding began on December 31, 1977, when contracts setting rates and conditions for telex and TWX service provided by WU to the ICPs expired by their own terms.[3] Those agreements had provided that telex/TWX service would be furnished to the ICPs at rates discounted 5.5 percent below the respective public tariffed rates. On December 2, 1977, WU filed proposed tariff revisions to establish rates for telex/TWX service provided to the ICPs after the settlement agreements expired. This tariff proposed to eliminate the 5.5 percent ICP discount and to charge the ICPs the full public rate. The proposed tariff originally was scheduled to become effective on March 24, 1978, but was subsequently deferred by WU to May 10, 1978.

3. In response to WU's proposed rate increases, the Commission initiated CC Docket 78-97 to investigate charges that WU's telex/TWX services were earning excessive returns and that those returns were used to subsidize other services. The CC Docket 78-97 investigation originally examined the rates charged the general public,[4] but was later expanded to include rates applicable to interconnected carriers, which were premised on the public rates.[5] In addressing the rates charged for interconnected service, our investigation focused on the reasonableness of WU's proposed rate structure, which averaged the costs of providing service to the public and the ICPs. The ICPs contested this rate structure, alleging, inter alia, that it was significantly less expensive for WU to provide telex/TWX service to them than to the general public. The ICPs argued that the different cost characteristics of providing service to the two classes of customers militated against a single, averaged rate structure and required that the ICPs be given a discount from the public rate.

4. As our investigation into interconnected telex/TWX rates progressed, we found that the statute governing rates for international telex/TWX traffic, former Section 222(e) of the Communications Act of 1934 (Communications Act), 47 U.S.C. § 222(e), required that we approach the ICP telex/TWX rate issue in a complicated and unusual manner.[6] First, Section 222(e)(1) mandated that charges for outbound telex/TWX service to the ICPs be established only through mutual agreement of WU and the ICPs, or through a Commission prescription following a hearing. *ICP Telex / TWX Order*, 69 FCC 2d at 118. Second, Section 222(e)(1), by limiting its purview to outbound telex/TWX traffic, implicitly distinguished between inbound and outbound telex/TWX traffic, even though such traffic employed identical facilities and involved the same

parties. No language in the statute required mutual agreement on rates for inbound telex/TWX traffic. WU proposed to increase both outbound and inbound traffic rates in the same proposed tariff revisions, however, a procedure that our *ICP Telex / TWXOrder* found to be impermissible under our interpretation of Section 222(e). Stating that "we are constrained by this statutory language to reach an anomalous result which Congress could not have intended and evidently did not anticipate," *id.*, we suspended pending investigation WU's proposed rates for interconnected inbound telex/TWX service and rejected the proposed interconnected outbound traffic rates. We continued our investigation in CC Docket 78-97 in anticipation of prescribing rates for interconnected outbound traffic, as the statute required. Our interpretation of Section 222(e) was later upheld by the D.C. Circuit Court of Appeals in *WUI v. FCC*.

B. Rejection of Proposed Rate Agreement; Rejection of Discount

5. On August 10, 1978, WU's tariffs for inbound ICP telex/TWX service became effective, eliminating the ICP discount and charging the ICPs the full public rate. On October 1, 1978, reacting to an increase in its costs, WU filed tariff revisions increasing its public telex/TWX rates. In January 1979, WU and the ICPs asked the Commission to accept a negotiated settlement of their continuing dispute over outbound rates. The proposed settlement was premised on the public rates effective prior to the October 1, 1978 increase, and would have allowed the ICPs a substantial discount from the currently effective public telex/TWX rate for both inbound and outbound service. By an Order released April 20, 1979,[7] we rejected the proposed agreements on a number of grounds. Following our rejection of the proposed agreements, WU and the ICPs informed the Administrative Law Judge (ALJ) assigned to the CC Docket 78-97 investigation that further negotiations had failed. On July 24, 1979, the ALJ prescribed interim rates for outbound telex/TWX service to the ICPs, pending conclusion of the investigation.[8] The ALJ found no indication that an ICP discount was justified, and set the rates for interconnected outbound telex/TWX service equal to the public rates. The ALJ also imposed an accounting order on WU in case the CC Docket 78-97 investigation should conclude that the ICPs were entitled to a discount from the prescribed rates.

6. With the ALJ's interim prescription of outbound rates, effective rates for all customers of WU's telex/TWX service were established, and the rates charged the ICPs for both inbound and outbound traffic were, at least for the interim, set equal to those paid by the public for the same service. No rates had been in effect for inbound telex/TWX service to the ICPs between the date the settlement agreements expired and the date the WU inbound tariff went into effect (January 1, 1978 to August 10, 1978), and no interconnected outbound rates were in effect from January 1, 1978 until the ALJ's rate prescription of July 24, 1979. During those periods, the ICPs continued to pay, despite WU's protests, the rates in effect for telex/TWX service prior to January 1, 1978, which included a 5.5 percent discount from the public rates in effect prior to the August 10, 1978 general rate increase.

7. When the presiding judge retired, the ALJ who replaced him reopened the investigation and bifurcated the proceeding into Phases I and II. In March 1982, the second ALJ issued his *Initial Decision* in CC Docket 78-97, Phase I,[9] which reversed the first ALJ's conclusions, and found, *inter alia*, that WU did realize significant cost savings in providing ICP interconnected service, that the ICPs were entitled to a large discount from the public rate and that WU owed the ICPs a substantial refund for amounts overpaid in the past.

8. These findings, and virtually all the other findings in the *Initial Decision*, were reversed by the Commission in its *Final Decision* on October 28, 1983.[10] In that Order we concluded, *inter alia*, that WU did not realize significant cost savings in handling ICP-interconnected telex/TWX traffic as opposed to public domestic telex/TWX traffic and that the ICPs were not entitled to a discounted rate. The *Final Decision* was affirmed on appeal to the United States Court of Appeals for the Second Circuit.

C. Phase I Reimbursement Order

9. On November 28, 1983, WU filed a petition for reconsideration and clarification of the *Final Decision*, arguing that our finding that WU did not realize any significant cost savings in providing interconnected service was tantamount to a decision that the discounts taken unilaterally by the ICPs during the disputed period were taken wrongfully. WU therefore requested that the ICPs be required to reimburse WU for the amounts withheld. In the *Phase I Reimbursement Order*, we granted WU's petition in part. In that Order, we distinguished between inbound and outbound traffic, noting the differing regulatory treatment for those services imposed by former Section 222 of the Communications Act. We denied WU's petition for reimbursement of the discounts taken by the ICPs on inbound traffic because those rates were increased by WU's tariff revisions following the normal suspension procedure. Because the proposed rate increases for inbound traffic went into effect within five months of their original proposed effective date, WU was accorded the full protections established in Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204 and 205, and did not require extraordinary relief. *Phase I Reimbursement Order*, 102 FCC 2d at 496.

10. Conversely, we granted WU's petition for reimbursement of the discounts taken on outbound traffic. Former Section 222 removed outbound rates from the normal tariff revision process and required that, absent agreement of the parties, rates for outbound service could be established only by a Commission prescription following a rate hearing. We found that the statute thus deprived WU of the protection afforded by the five-month statutory limit on suspension of reasonable rate increases established in Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). We also found that, because the agreements between WU and the ICPs that established telex/TWX rates expired on December 31, 1977, former Section 222 prevented any final rates from taking effect prior to a rate prescription following completion of our rate investigation. We concluded that former Section 222(e) and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), implicitly empowered us to establish rates for the period during which no rates were in effect.

11. In so holding, we rejected a number of procedural and substantive arguments propounded by the ICPs. We found that WU's petition was procedurally correct and did not violate the applicable statute of limitations. We also found that WU did not waive its right to seek the

relief requested in its petition, and that a grant of WU's petition does not require a finding that the rates actually paid by the ICPs were noncompensatory. We rejected ICP claims that the rates established in the contracts that expired on December 31, 1977 were perpetuated by action of the filed rate doctrine. We also rejected arguments that we lacked statutory authority to prescribe rates for the period in question, and that such a prescription constituted retroactive ratemaking. Finally, we found that the required reimbursement to WU would not be inequitable to the ICPs because they were on notice that WU would pursue such a claim and that they were aware that they might be required to reimburse WU.

12. Petitions for reconsideration of the *Phase IReimbursement Order* were filed by ITT, RCAGC, MCI/WUI[11] and TRT on September 18, 1985. WU filed an opposition to these petitions on October 10, 1985, and replies were filed by MCI/WUI,[12] RCAGC and TRT on October 25, 1985, and by RCAGC on October 29, 1985.[13] The ICPs seek reconsideration of our Order on a number of grounds, beginning with procedural arguments. They next raise issues of statutory interpretation and examine Commission decisions and court precedent to argue that legal rates were in effect during the period in question, and that we do not have authority to order the retroactive relief contemplated in the *Phase I Reimbursement Order*. The ICPs then argue that WU is prevented by collateral estoppel from pursuing its claim, and that the *Phase I Reimbursement Order* is inconsistent with other Commission actions. The ICPs then raise a host of equitable arguments for reconsideration, contest the inclusion of interest in the award to WU, and, finally, argue that the WU claim should be dismissed as moot. These arguments are discussed seriatim in the following sections.

III. DISCUSSION

A. Procedural Issues

13. The ICPs include in their petitions two procedural arguments that substantially restate arguments rejected in the *Phase I Reimbursement Order* or elsewhere in the CC Docket 78-97 investigation. First, RCAGC restates its argument that, under Section 1.277 of the Commission's Rules, 47 C.F.R. § 1.277, WU waived its right to claim retroactive reimbursement because it failed to file specific exceptions to certain Commission Orders. RCAGC Petition at 13. RCAGC notes that WU failed to file exceptions to the *InterimPrescriptionOrder*, which prescribed rates for outbound telex/TWX service prospectively. Moreover, RCAGC argues that when WU did file an exception to the second ALJ's *Initial Decision*, which granted the ICPs a 15 percent discount and refunds in excess of $75 million, WU "expressly dated the beginning of the case as August 10, 1978 .eight months after the January 1 date Western Union now says its 'general exception' was intended to cover." RCAGC Petition at 13; RCAGC Reply at 5-6. WU replies that no exception to the *Interim Prescription* was necessary because that Order did not address the issue of retroactive relief. WU also states that, when it dated its exception from August 10, 1978, it referred to the ALJ's finding that the WU rates that became effective on August 10, 1978 should have included an ICP discount. WU states that this fact does not affect WU's ability to claim relief retroactive to January 1, 1978. We find that WU's failure to file an exception to the *Interim Prescription Order* is irrelevant because that Order did not address the issue of underpayments occurring prior to July 24, 1979. We also find that WU's reference to August 10, 1978, the date from which the ALJ calculated the ICPs' awards in the *Interim Prescription Order*, does not diminish the effect of WU's general exception to that Order, and does not bar WU's claim for a resolution of the divisions issue in its favor.

14. Second, ITT restates an argument rejected in the *Phase I Reimbursement Order*, alleging that WU's claim for relief is barred by the statute of limitations. We originally rejected this argument, finding that WU's claim was not within the purview of the statute of limitations provisions of Section 415(a) of the Communications Act, 47 U.S.C. § 415(a). We also explained that, assuming, arguendo, the Section 415 statute of limitations did apply, it did not begin to run until WU discovered the basis of its claim. Because the basis of its claim was our finding that no cost savings inhered in the provision of interconnected telex/TWX service, a finding reached in the *Phase I Final Decision* in 1983, WU's petition was timely. ITT argues that "the Commission has plainly and erroneously confused itself with Western Union" because *the Commission* discovered the basis for WU's claim in 1983, while WU knew it all along. ITT Petition at 16. WU counters by restating our finding that Section 415 does not apply to this case because WU's petition for reconsideration and clarification was not an "action at law," as contemplated by the statute. It also states that ITT's attempted semantic distinction fails because the statute of limitations did not begin to run until the *Final Decision* was released. WU Opposition at 17. ITT reasserts its position in its Reply at 9 n.8. We reject ITT's arguments. ITT has failed to show that Section 415 is applicable in this case. In addition, its attempted reliance on semantics to confuse WU's assertion of its claim with our finding that the claim was actionable is irrelevant. No basis for WU's claim existed until we found that WU did not realize significant cost savings in serving the ICPs. WU could not have "discovered" that fact until the *Final Decision* was released, and WU filed its claim for reimbursement within 30 days of that date.

B. The "Rate Hiatus"

15. The ICPs dispute on three grounds our finding that, following expiration of the WU/ICP contracts on December 31, 1977, no rates were in effect for interconnected outbound telex/TWX service until the ALJ prescribed interim rates on July 24, 1979. First, ITT argues that the contract between it and WU did not expire, rather, it specifically provided that the rates set in the contract would continue until the Commission acted on WU's application to increase its rates. ITT Petition at 3. WU responds that ITT misreads the language of the contracts, and notes that the Commission found that the contracts had expired in the *ICPTelex / TWXOrder* in 1978 and again in the *Phase I Reimbursement Order* in 1985. WU Opposition at 12 n. 2, citing 68 FCC 2d at 111 and 102 FCC 2d at 495. We reject ITT's arguments and find that ITT has offered no new evidence in support of its claim, and that its argument serves only to voice its dissatisfaction with the findings we made in our previous Orders.

We also note that the Second Circuit Court of Appeals specifically upheld our finding that the WU/ ICP contracts expired. *FTCC v. FCC*, 750 F.2d at 232.

16. ITT next argues that, even if the contracts establishing telex/TWX rates did expire, the contract rates remained in effect by action of former Section 222(e) of the Communications Act. ITT argues that Section 222(e)(1) allows for rate changes by agreement of the affected parties or by Commission prescription, and that under Section 222(e)(3), rate changes can be effected by the Commission after we complete a full hearing on our own initiative or in response to a carrier complaint. ITT then notes that the statute precluded WU from "unilaterally terminat[ing] the previously existing divisions of revenues effective as of January 1, 1978. Any change would have to be prospective from the post-hearing prescription " ITT Petition at 7. WU does not respond to this argument.

17. ITT correctly summarizes the methods for effecting a rate change under former Section 222(e)(1) and (3). ITT's following argument is not entirely clear, although it appears to conclude that the rates effective prior to January 1, 1978 were terminated by some unilateral act on WU's part. In fact, the "rate hiatus" came about by mutual agreement of the parties, *ie.*, by the contractual agreements that the contract rates would expire on December 31, 1977. WU attempted to establish new rates by unilateral act, but we found such action impermissible under Section 222(e). ITT is attempting to argue that Section 222(e) somehow acts to prevent a rate hiatus. We find no language in the statute in support of this claim, and therefore reject it. In fact, as is discussed in detail below, we find that former Section 222(e) does not address the situation that confronted the Commission and the carriers on Janury 1, 1978, and that this shortcoming was primarily responsible for the rate hiatus and for the cumbersome bifurcated regulatory approach that we were forced to take in prescribing rates for that period.

18. Finally, ITT argues that our construction of the filed rate doctrine is "an erroneous statement of the law" and that the doctrine perpetuated the contract rates after January 1, 1978. In support of its arguments, it cites a number of federal cases. ITT Petition at 11-14. WU responds that the cases are inapposite. WU Opposition at 12-16. We will consider each case in turn. ITT first cites *Sunray Mid - Continent Oil Co. v. FPC*, 364 U.S. 137 (1980) for the proposition that a gas producer cannot abandon service without the Federal Power Commission's (FPC) authority. From this holding, ITT argues that WU is similarly prevented from terminating its discount to the ICPs without seeking a Commission prescription. ITT also cites *California v. Southland Royalty Co.*, 436 U.S. 519 (1978) as supporting the same rule. WU responds that *Sunray* deals with a gas producer's responsibility to continue providing gas and that "the Court did not assert (or even intimate) that the producer would be bound by the contract price beyond the expiration of the contract term." WU Opposition at 13. WU then dismisses the *Southland* case as wholly irrelevant to the case at hand.

19. We agree with WU that the *Sunray* and *Southland* cases are not relevant to the disposition of the instant dispute. *Sunray* involves a gas producer attempting to obtain FPC certification for 20 years (a period coterminous with a contract to sell gas at specified rates), as opposed to the indefinite certifications usually issued by that agency. The Court upheld the FPC's refusal of such certification after evaluating the regulatory scheme of the Natural Gas Act. The Court found that, if Sunray were granted a 20 year certification, it could, upon expiration of the contract, unilaterally or by contract increase its rates and file for a new certification under Section 5 of the Act. Such filing would be treated as a request for certification of a new service, and the new rates would remain in effect until the FPC completed a rate case, after which it could modify the rates prospectively. FPC rate cases typically ran in excess of six years. 364 U.S. at 144. In contrast, if the FPC granted a certification of indefinite duration, a proposed rate increase following the expiration of Sunray's contract would fall under Section 4(d) of the Act. The proposed rates would then be subject to the normal rate investigation procedure with a maximum suspension period of five months.

20. The *Sunray* case is distinguishable from the case at hand because, unlike former Section 222(e) of the Communications Act, the Natural Gas Act provided for carrier-initiated rate increases. Under the Natural Gas Act, a rate hiatus following expiration of the carrier's contract was impossible, because the carrier was given two options for increasing its rates unilaterally. Section 5 of that Act allowed only prospective adjustment of rates, but granted the carrier *carte blanche* to set the rates it chose prior to the completion of the rate case. Section 4(d) allowed the carrier to increase its rates, subject to suspension, and provided the carrier the protection of a five-month limit on suspension, after which the proposed rates, or new rates prescribed by the FPC, would become effective. In contrast, Section 222(e) of the Communications Act specifically prevented WU from taking unilateral action to increase its rates for interconnected outbound service, and required that such rates be prescribed only following a full hearing. These distinctions between the statutes applicable in the two cases render *Sunray* valueless in supporting ITT's case.

21. ITT's reliance on *Southland* is similarly in error. In that case, the Supreme Court upheld an FPC finding that the Natural Gas Act superseded the terms of a private contract and prevented a carrier from abandoning service without authorization. The case is not even remotely relevant to ITT's argument that the filed rate doctrine perpetuated the expired telex/TWX rates beyond the term established by contract.

22. Finally, ITT offers *Pennsylvania Power Co. v. FPC*, 343 U.S. 414 (1952) to support its claim that, "[e]ven if the underlying contract is terminated by its own provisions, the contract rates continue in effect as the 'filed rate' until they are superseded by new tariffs or contracts established pursuant to the appropriate regulatory scheme." ITT Petition at 13. WU argues that, like *Sunray*, the carrier in *Pennsylvania Power* was free to raise its rates pursuant to statutory procedures analogous to those established in Section 203(c) of the Communications Act. WU Opposition at 15-16.

23. We find that *Pennsylvania Power* fails to support ITT's argument. In that case, the FPC prescribed a rate reduction and otherwise required Penn Water Company to "continue to buy, sell and transmit power in the same coordinated manner in which it and Consolidated [a power company] have been functioning for more than twenty years." 343 U.S. at 421. Penn Water attempted to circumvent the rate reduction by charging *inter alia*, that the FPC order required Penn Water to continue performing according to a contract that had been found in

violation of antitrust laws. The Court rejected this argument, finding that the FPC prescription was formulated without reference to the contract, following an extensive rate investigation. We find that *PennsylvaniaPower* involves neither a rate hiatus nor a perpetuation of contract rates, and is wholly inapposite to the case at hand. We further find that ITT has failed to present any arguments to justify reconsideration of our determination that no outbound interconnected rates were in effect between January 1, 1978 and July 24, 1979, and that the filed rate doctrine is not applicable to the facts of this case.[14]

C. Retroactive Rate Prescriptions

24. The ICPs argue that we lack authority to order the retroactive relief granted WU in the *Phase I Reimbursement Order*. First, they argue that the plain language of former Section 222(e) specifically proscribes such awards. Next, they cite our decision in *Tropical Radio Tel. Co.*, 17 FCC 645 (1953), as supporting the view that such awards are prohibited. Finally, they review the cases cited in the *Phase I ReimbursementOrder* as support for our decision, and conclude that these cases do not provide any foundation for our authority under Section 4(i) or elsewhere in the Communications Act to provide the relief sought by WU. WU responds to these arguments, admitting that *Tropical Radio* limits the Commission's ability to grant restitutionary relief under Section 222(e), but arguing that subsequent Commission decisions have disapproved *Tropical Radio* as "unnecessarily restrictive." WU then argues that, even if the Commission does lack authority to grant the requested relief under Section 222(e), such authority does obtain by action of Section 4(i) of the Act. 47 U.S.C. § 154(i). The merits of these arguments are discussed below.

1. Authority Under Section 222(e) of the Communications Act

25. The ICPs argue that former Section 222(e) provides for prospective rate prescriptions exclusively, and that this interpretation is supported by the plain language of the statute, previous Commission Orders and court decisions. First, ITT argues that the plain language of Section 222(e)(3) allows for a Commission prescription of rates, but only after a hearing. ITT contends that "any changes would have to be prospective from the post-hearing prescription." ITT Petition at 7. A similar argument is voiced by TRT, which notes that the etymology of the term "prescription" denotes directions for future actions, and necessarily militates against retroactivity.

26. We agree with the ICPs that Section 222 contemplated only two instances in which telex/TWX rates would be established. Section 222(e)(1) provides for the establishment of new rates following the consolidation or merger of telegraph carriers. These rates could be set by agreement of the interested parties, or by Commission prescription following due notice and hearing. See note 6, *supra*. Section 222(e)(3) provides for Commission review of extant or proposed rates, and allows a rate prescription if the Commission, after a "full hearing" finds those rates unjust or unreasonable. *Id.* It is clear that Section 222 does not address a scenario in which rates for an extant service terminated during a transition from contractual agreement to regulatory prescription. The plain language of Section 222(e) thus indicates nothing more than the statute's failure to provide for a rate hiatus during the requisite Commission rate hearing. Although the statute is silent as to the Commission's prerogatives in remedying that situation, we conclude that the authority to produce retroactive relief is implicit from the statute's express provision, which authorizes only two methods of producing effective rates. Consequently, we find that the language of Section 222(e) was not intended to deprive the Commission of authority to order retroactive relief in this case.

27. In addition, TRT notes that Section 222 provides for rate changes only by mutual agreement of the carriers or Commission prescription, and not by unilateral, carrier-initiated ratemaking. TRT then argues that, in the *PhaseIFinal Decision*, we justified our findings "on the grounds that 'within the process of carrier-initiated rate making, carriers are given considerable flexibility to average their cost among their subscriber base,'" and contends that this emphasis on principles of carrier-initiated ratemaking is proscribed by Section 222. Moreover, TRT suggests that, by imposing WU's tariffed rates upon the ICPs, we are imposing a "unilateral fixing of divisions" for the expired contract rates, in contravention of Section 222's requirements. TRT Petition at 10-12. The *PhaseIFinal Decision* has, of course, been affirmed by the Court of Appeals for the Second Circuit and TRT is accordingly foreclosed from arguing that the *Phase I Final Decision* was erroneous. We also reject TRT's characterization of our *Phase I Reimbursement Order* decision to adopt the effective public rate as a measure of compensation for interconnected outbound traffic during the January 1, 1978 – July 24, 1979 period as unilateral ratemaking by WU. This Commission established the compensation for that period pursuant to our Section 222 and Section 4(i) powers. None of the parties has demonstrated that any other measure of compensation would be more reasonable.

28. The ICPs next argue that the Commission's decision in *Tropical Radio Tel. Co.*, 17 FCC 645 (1953)(*Tropical*), establishes that retroactive rate adjustments are impermissible under Section 222(e). In that case, the Commission addressed a complaint by the Tropical Radio Telegraph Company (Tropical) that WU's rates for outbound telegraph service were discriminatory. Following the promulgation of former Section 222 in 1943, the Commission established a divisions formula that required uniform rates to be established by agreement of the interested carriers. No such agreement was forthcoming, and WU continued to charge rates established by contract with individual carriers prior to 1943. In 1950, Tropical filed a complaint against WU, charging that the rates it was paying were higher than the rates charged other carriers, in contravention of the Commission formula. Tropical requested that the Commission prescribe lower rates, retroactive to 1946. The Commission found the WU rates unreasonable and granted Tropical's petition for a prescription of lower rates, but refused to make the prescription retroactive. The *Tropical* opinion stated (17 FCC 2d at 649):

> Section 222(e) does not give the Commission authority to make retroactive adjustments of divisions covering periods prior to the prescription or approval of a specific method for dividing charges. The United States Supreme Court has stated that the power to require readjustments of divisions for the

past is drastic and has indicated that such power would not be presumed to lie in regulatory commission unless the power was conferred in very plain words. *Brimstone R. & Canal Co. v. U. S.*, 276 U.S. 104, 122 (1928). See also *U. S. v. B. & O. R. Co.*, 284 U.S. 195 (1931).

29. The ICPs draw a number of conclusions from the *Tropical* decision. MCI/WUI argues that our failure to distinguish *Tropical* in the *PhaseIReimbursementOrder* was a "pivotal oversight" that undermines the Order. Reply at 3. MCI/WUI further asserts that the findings in *Tropical* must be given special deference in the instant controversy because the case was decided contemporaneously with the promulgation of the statute it interpreted and has "stood the test of time" for three decades. *Id.* at 6-7 (citations omitted). ITT argues that the *PhaseIReimbursementOrder* reversed both the Commission's policy and its interpretation of the Communications Act as stated in *Tropical*, and that such reversal requires more than the "bald, unadorned statement of the new revised interpretation of the statute " Petition at 10-11 (citations omitted). Finally, the ICPs argue that equitable considerations militate against our reversal of the *Tropical* holdings. RCAGC argues that we first mentioned the possibility of retroactive relief for WU in the 1979 *Rejection Order*, and that, prior to that Order, the ICPs were unaware that they might be subject to such a claim. RCAGC Petition at 7, 22; *see* MCI/WUI Petition at 9 n.10.

30. WU agrees that "the 1953 *Tropical Radio* decision is consistent with the IRC's argument," but argues that the ICPs never cited *Tropical* in their oppositions to WU's petition for reconsideration and clarification of the *Phase I Final Decision* and that the ICPs argued in support of retroactive adjustments of divisions earlier in the CC Docket 78-97 proceeding. WU also states that it billed the ICPs the full public rates and otherwise gave notice that it would pursue its claim for a retroactive prescription. From this, WU concludes that the ICPs did not rely on the *Tropical* decision in pursuing their claims against WU or in responding to WU's counterclaims. WU Opposition at 6, 16 n.1, 21 and 22 n.1. WU also lists a number of Commission decisions and court of appeals cases that purportedly disapprove the *Tropical* holding as "unnecessarily restrictive." *Id.* at 7-9. ITT replies that the cases cited by WU do not provide a basis for overturning *Tropical*. Reply at 2-3.

31. Our decision is not inconsistent with the statement in *Tropical* that Section 222(e) does not specifically empower this Commission to make retroactive adjustments in divisions. As previously noted, the 1943 Congress did not describe the actions that this Commission could or could not take during such a period.

32. However, the statement in the *Tropical* opinion that a regulatory agency cannot make a retroactive adjustment in divisions "unless the power was conferred in very plain words" must be read in context. Moreover, to the extent that it may be read as inconsistent with our action herein, we hereby expressly overrule it. The *Tropical* Commission relied extensively upon *Brimstone*, a 1928 Supreme Court opinion relating to powers conferred by the Interstate Commerce Act. That decision is inapposite to the instant case because *Brimstone* did not involve a rate hiatus resulting from express statutory requirements; rather, effective rates had been established by agreement of the parties.[15] The second case relied upon in *Tropical*, *United-Statesv. Baltimore & OhioR. Co.*, 284 U.S. 195 (1931), is similarly inapposite because it involved the ICC's attempt to set rates retroactively between carriers having a joint agreement in effect.

33. Similarly, the *Tropical* Commission failed to discuss or analyze decisions such as *National Broadcasting Co. v. UnitedStates*, 319 U.S. 190 (1942), that had already adopted an expansive interpretation of this Commission's authority to create remedies that are not expressly described in Titles II or III in order to accomplish the goals of the Communications Act. In addition, subsequent court decisions confirm that Section 4(i) of the Communications Act allows this Commission considerable discretion to effect regulatory processes and procedures not specified elsewhere in the Act. *See, e. g. United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975).

34. Other more recent Commission and court decisions have, of course, considered the nature of this Commission's powers to adjust compensation that is paid during a rate hiatus. In *Lincoln Tel. & Tel. Co.*, 72 FCC 2d 724 (1979) an exchange carrier was required to provide access service to interexchange carriers even though it did not have an effective tariff for access service and had not entered into any agreement to establish access service compensation. We decided to establish a billing and collection rate that would be paid until this Commission determined the appropriate compensation and ordered a retroactive adjustment in the interim compensation. Our *Lincoln* opinion necessarily determined that this Commission has the power to make such a retroactive adjustment. That determination was affirmed on appeal. *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981).

35. This Commission actually made such a retroactive adjustment in an interim billing and collection rate in a subsequent case. An ENFIA tariff expired by its own terms in 1982 and this Commission rejected the replacement tariff. That action created a rate hiatus. We decided to follow the same procedure that we had used in *Lincoln*. This Commission established an interim billing and collection rate that would be subject to retroactive adjustment when we determined the appropriate compensation. We subsequently made such a retroactive adjustment that required the interexchange carriers to pay additional compensation. Some interexchange carriers challenged our authority to make such an adjustment. The Court of Appeals affirmed our decision. *Exchange Network Facilities for Interstate Access* (*ENFIA*), 93 FCC 2d 739 (1983), *aff ' d mem. sub nom. GTE Sprint Communications Corp. v. FCC*, 733 F.2d 966 (D.C. Cir. 1984).

36. Our decision to make a retroactive adjustment in this case is consonant with the applicable Commission and court precedents. Assertions that our action represents a change in course are incorrect. Failure to apply the *Lincoln / ENFIA* procedure would have been a change in course. To the extent that *Tropical* is interpreted to mean that this Commission cannot make adjustments in compensation that was paid during a rate hiatus, that decision has already been overruled by the Commission and court decisions that affirmed our power to make such adjustments. Even if the *Lincoln* and *ENFIA* decisions did not exist, we could overrule *Tropical*, as we have done *supra*, or limit its effect. We therefore reject the ICP allegations that failure to discuss the *Tropical* decision in the *Phasel Reimbursement Order* "undermines" that decision. As we discuss in para. 38, *infra*, the ICPs' conduct

and pleadings earlier in the CC Docket 78-97 investigation do not indicate any reliance on the *Tropical* decision. Therefore, no carrier has been harmed by any departure from the holding in *Tropical*. We also reject MCI/WUI's argument that *Tropical* should be given special deference in this case because it was decided shortly after Section 222(e) was enacted and because it has "stood the test of time." As stated above, the statutory construction expounded in the *Tropical* decision did not consider whether the Commission may draw upon its authority under Section 4(i) to prescribe rates during a rate hiatus that resulted from an apparent oversight in Section 222. Moreover, the "contemporaneousness" of *Tropical* with the enactment of Section 222 in our view signifies nothing more than a coincidental confluence of events. MCI/WUI's argument that *Tropical* has stood the test of time is similarly specious. During the 38 year life of former Section 222, the issue of the Commission's authority to prescribe rates retroactively under that statute has arisen twice, under *Tropical* and in the instant case. The *Tropical* decision has, in fact, not been tested at all until this proceeding.

37. ITT cites *Western Union International, Inc. v. FCC (WUI v. FCC)*[16] and *Columbia Broadcasting System, Inc. v. FCC (CBS v. FCC)* [17] to support its argument that the "bald, unadorned" statement in the *Phase I Reimbursement Order* is inadequate to reverse the *Tropical* decision. In fact, the latter case supports our reversal of the *Tropical* decision, and the former is inapposite. In *CBS v. FCC*, the court stated that We do not challenge the Commission's well established right to modify or even overrule an established precedent or approach, for an administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to its prior rulings. Lodged deep within the bureaucratic heart of administrative procedure, however, is the equally essential provision that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is not indifferent to the rule of law. 454 F.2d at 1026. *See, e. g., Spartan Radiocasting v. FCC*, 619 F.2d 314, 322 (4th Cir. 1980). Consistent with the passage cited above, the *Phase I Reimbursement Order* contains a thorough and detailed analysis of our decision to prescribe outbound rates retroactive to January 1, 1978 which belies ITT's assertion that we provided only a "bald, unadorned statement" of our position. We also find that *WUI v. FCC* is inapposite to the instant proceeding. In that case, the court found that, because the Commission reversed its findings without explanation, those findings were entitled to no special weight on appeal. 544 F.2d at 91. This decision adds nothing to ITT's argument because we have gone to considerable lengths, both in the *Phase I Reimbursement Order* and in this Order, to explain the basis for our actions.

38. We reject RCAGC's argument that, in reliance on the *Tropical* decision, it took no steps to reserve funds or adjust rates to offset the adverse impact of a potential retroactive reimbursement to WU. Earlier in the CC Docket 78-97 proceeding, when an ALJ found that the ICPs were entitled to larger discounts than they had taken, RCAGC and the other ICPs argued for, and were granted, refunds retroactive to January 1, 1978. *Initial Decision*, 95 FCC 2d at 948-53. Those arguments directly contravened the ICPs' present interpretation of the holding in *Tropical*. Those arguments thus undercut RCAGC's claim that it modified its past behavior in reliance on the interpretation of the *Tropical* holding as it currently asserts. In addition, as we discuss *infra* at paras. 52-54, and as we found in the *Phase I Reimbursement Order* at paras. 36-41, Commission decisions and WU conduct should have served to put the ICPs on notice that they might be required to make the reimbursements requested by WU.

2. *Authority Under Other Sections of the Communications Act*

39. The ICPs next argue that the cases relied upon by this Commission in the *Phase I Reimbursement Order* do not support our prescription of telex/TWX rates for the period during which no rates were in effect. WU responds with arguments in support of the cases' precedential value. The cases will be discussed in turn. First, ITT and RCAGC cite the Commission's brief in *FTCC v. FCC*, quoting the statement that, "if the ICPs' position on interim charges had been accepted [by the Commission], Western Union would have had no way to recover the underpayments for this interim period." ITT Petition at 15, and RCAGC Petition at 11, quoting FCC Brief in *FTCC v. FCC*, dated June 13, 1984, at 52. ITT and RCAGC construe that statement as an admission by the Commission that we lacked authority to prescribe rates prior to the July 1979 interim prescription. Moreover, they assert that the court relied on that representation, and that the decision in *FTCC v. FCC* precludes, through res judicata and collateral estoppel, WU's claim for retroactive relief. ITT Petition at 17; RCAGC Petition at 16-17; RCAGC Reply at 2-3. WU responds that the ICP position argued before the court asserted that the Commission had neither interim nor retroactive ratemaking authority, and that the Commission counsel referred to this fact in the quoted statement. WU further argues that, in rejecting ICP arguments that the Commission lacked authority to establish interim telex/TWX rates, the court "construe[d] the Communications Act so as to give the Commission broad authority to fill the void created by the absence of any agreed-upon or prescribed division during the period prior to the final determination of lawful divisions or rates." WU Opposition at 9. WU also states that *FTCC v. FCC* cannot serve as res judicata or effect collateral estoppel because, *inter alia*, the issue of a rate prescription for the period prior to July 1979 was never at issue in the case.

40. In the *Phase I Reimbursement Order*, we cited *FTCC v. FCC* in support of our conclusion that "[t]he fact that the [Communications] Act does not contain language specifically empowering the Commission to make retroactive rate adjustments in certain circumstances does not deny us this power." 102 FCC 2d at 497. We repeat that conclusion here. The *FTCC* court found in Section 4(i) of the Communications Act implicit authority to effect an interim rate prescription in order to ameliorate the patently inequitable effects of Section 222(e), which prevented WU from raising its rates prior to final or interim Commission action. The court stated that, "[i]f it were otherwise, the IRCs would have every incentive to refuse to negotiate with WU and to delay the resolution of the ratemaking process for as long as possible in order to keep the benefits of the lower, expired contract rates." 750 F.2d at 232. The case is silent as to our authority to grant WU the relief we prescribed in the *Phase I Reimbursement Order*, because the only question before that court was the propriety of our interim rate prescription. For this reason, the ICPs' res judicata and collateral

estoppel arguments must be rejected. *FTCC v. FCC* is supportive of the rationale underlying our reimbursement Order, however, because it recognizes that Section 4(i) of the Communications Act allows us substantial latitude in effecting equitable solutions to problems not specifically addressed elsewhere in that statute.

41. The ICPs next attempt to distinguish *Lincoln Tel. & Tel. Co. v. FCC*, stating that "the issue of whether retroactive adjustments to interim rates are permissible was not before the court." ITT Petition at 18; *see* MCI/WUI Reply at 7. ITT further argues that *Lincoln* is distinguished on the facts because in that case, no "filed rates" existed, and the Commission's interim prescription "was thus necessary to provide Lincoln Tel with *any* income at all " ITT Petition at 18 (emphasis in original). WU asserts that we were correct in citing the case in support of our finding that the Communications Act may be construed "to give the Commission broad authority to fill the void created by the absence of any agreed-upon or prescribed division during the period prior to the final determination of lawful divisions or rates." WU Opposition at 9 (footnote omitted).

42. Although the ICPs correctly note certain factual differences between this proceeding and *Lincoln*, we believe that *Lincoln* supports our actions here. *Lincoln* supports the proposition that the Commission may validly devise remedies not specified in the Act if Congress has failed to address a particular situation. We also reject ITT's argument that the existence of previously established rates for interconnected service distinguishes the instant case from *Lincoln*. First, we repeat our finding that there were no "filed rates" in effect during the period in question, and the cases are not distinguishable on that ground. Second, we note that the presence vel non of previously existing rates is irrelevant to the issues raised in this case. The operative concern is that the Commission has authority under Section 4(i) and Section 222 to effect retroactive rate changes if final rates were not, and could not have been, established prior to the conclusion of a rate case. Finally, we reject ITT's claim that *Lincoln* is distinguishable because the telephone company faced the loss of all interconnection revenues. The fact that *Lincoln* involved the potential loss of all of the telephone company's interconnection revenues, while the instant case concerns only the loss of part of WU's just and reasonable interconnection charges, does not provide a reasonable basis for distinguishing the cases. We also note that an expired rate did exist in the *ENFIA* case. This Commission established compensation that differed from the expired rate and the compensation that was actually paid during the rate hiatus. That decision was affirmed on appeal.

43. ITT next attempts to distinguish *Bell Tel. Co. of Pa. v. FCC*, 761 F.2d 789 (D.C. Cir. 1985), on the grounds that, in that case, we did not "retroactively chang[e] the formula or method for calculating payments .", but instead decided "how [the] existing formula should be applied to a disputed set of facts " ITT Petition at 19. We find that this is a distinction without a difference. The *Bell Tel.* court cited with approval language used by the Commission in ordering a different retroactive adjustment:

> Furthermore, under circumstances where it is the terms of an agreement that are at issue and both sides have participated in the proceeding and have been given notice as to the actual effective date of the rate, and where any of the parties may be responsible for error, fairness dictates that a retroactive adjustment be applicable to either side.
>
> 761 F.2d at 791, citing *Exchange Network Facilities for Interstate Access*. The existence of a prior agreement or formula was not our central concern when we made the above statement, or when the Court of Appeals applied that language in the *BellTel.* case. Rather, the primary concern was the equitable resolution, under Section 203(c) of the Communications Act, of a dispute in which both parties may have been at error, and had notice of the amounts in dispute and opportunity to support their respective positions before the Commission.

44. Finally, MCI/WUI argues that the Commission "cannot read its implied powers under Section 4(i) into former Section 222(e)" because the latter section must be strictly construed and because retroactive rate adjustments are so drastic a measure that they cannot be assumed absent very clear statutory language, and cites four cases as support. MCI/WUI argues that *ITT World Communications v. FCC*, 635 F.2d 32 (2d Cir. 1980)(*ITTv. FCC*) and *Western Union International, Inc. v. FCC*, 544 F.2d 87 (2d. Cir. 1976)(*WUI v. FCC*) held that the Commission was powerless to use implicit authority to contravene former Section 222(e) and grant WU authority to operate internationally. *Western Union Tel. Co. v. United States*, 267 F.2d 715 (2d Cir. 1959)(*WU v. US*) is cited for the proposition that we could not exceed our narrowly-delegated authority under Section 222 to supervise WU's divestment. Finally, MCI/WUI cites the *Brimstone* case to support its claim that readjusting past rates is so drastic a remedy that it requires specific statutory authority. MCI/WUI Reply at 11-12 & n.9.

45. We are not persuaded by MCI/WUI's arguments. First, *ITT v. FCC* and *WUI v. FCC* are inapposite because they both involve applications by WU to provide international record service. Former Section 222 of the Communications Act was unequivocal in disallowing WU's involvement in international service, and the Commission's authority to act on WU's applications was clearly delineated. Those cases, therefore, do not involve the central issue in the instant case: whether the Commission can infer from the language in Section 222(e) and from Section 4(i)'s grant of broad powers, authority to prescribe rates (as required by Section 222(e)) applicable to a period during which no rates were in effect (created inadvertently by Section 222(e)). MCI/WUI's reliance on *WUv. US* is similarly misplaced. The court in that case remanded a Commission Order that established a fixed deadline by which WU had to divest itself of its international operations because the Commission failed to find that WU could comply with the deadline by exercising due diligence. The case has no relevance to the instant proceeding. Finally, MCI/WUI's *Brimstone* argument fails because, as previously noted, *Brimstone* involved the adjustment of agreed divisions. Moreover, our authority to effect rate adjustments retroactively, in certain circumstances, has been found implicit in Section 4(i) and consonant with the statutory scheme of Section 203 of the Communications Act. After reviewing the above precedents, we find that the ICPs have failed to state arguments adequate to merit reconsideration of our conclusion that we have authority to order the relief re-

quested by WU. We reaffirm our conclusion in the *Rejection Order*, reiterated in the *Phase I Reimbursement Order*, that "we have ample authority to frame a remedy which will afford a party relief for a past period in which it was inequitably or unlawfully treated." 71 FCC 2d at 630, 102 FCC 2d at 497.

D. Arguments in Equity

46. The ICPs raise a host of equitable arguments against the imposition of retroactive relief in WU's favor. They allege that the record in this case is inadequate to support a claim in quantum meruit, that the ICPs' conduct throughout the relevant proceedings was legal and equitable, that WU is estopped from raising its claim and that the ICPs would suffer severe economic harm if forced to pay WU's claim. These arguments are addressed in turn below.

1. Quantum Meruit

47. TRT argues that, because we lacked authority to effect a retroactive rate prescription, any relief granted to WU must be based on principles of quantum meruit. TRT Petition at 11; TRT Reply at 3. TRT then contends that such an award must be supported by a de novo review of WU's costs of providing interconnected service. This review assertedly must ascertain that the ICPs were at fault for the delay in establishing new rates, that the rates paid to WU were noncompensatory, that the ICP earnings during the period in question were excessive and that the ICPs would not be materially injured by the award to WU. TRT Petition at 14. TRT then contends that the record in CC Docket 78-97, Phase I, is inadequate to make the requisite showing on these four points, that WU's profits were excessive and that the rates paid by the ICPs were within the "zone of reasonableness." TRT Petition at 13, 21; TRT Reply at 6, 7. RCAGC also argues that our record is inadequate to determine whether equity would be served by granting WU's requested relief. RCAGC Petition at 22. WU responds that the above arguments are merely collateral attacks on our finding that WU does not realize significant cost savings in providing interconnected service. WU also alleges that the ICPs' earnings during the period in question were excessive. WU Opposition at 27, 29.

48. We agree with WU that the ICP attack on the adequacy of the CC Docket 78-97, Phase I, record is repetitive and irrelevant. As explained above, the Order requiring the ICPs to reimburse WU for the discounts unilaterally taken during the rate hiatus period was issued as a rate prescription following the completion of the CC Docket 78-97, Phase I, investigation. We reject the ICP premise that we had no statutory authority to effect such a prescription and their conclusion that we had to resort to extraordinary equitable relief in quantum meruit. We also reiterate our conclusion that the record in CC Docket 78-97, Phase I, is adequate to support our determination that no significant cost savings accrued to WU in providing interconnected service. This finding was affirmed by the Second Circuit Court of Appeals in *FTCCv. FCC*, and fully supports our determination that the discounts taken by the ICPs between January 1, 1978 and July 24, 1979 were not justified, and should therefore be removed from the rates prescribed for that period.

2. ICP Conduct

49. ICPs interpret two passages in the *Phase I Reimbursement Order* to indicate a finding that the ICPs engaged in recalcitrant, intransigent or otherwise culpable conduct, and they conclude that we granted WU's claim for reimbursement as a punitive measure. The ICPs contend that they honestly believed that they were entitled to a discount. Consequently, they assert that their conduct in opposing the WU rate increases was neither illegal nor inequitable to WU; that the delay in establishing increased rates was the fault of either WU[18] or the Commission, not the ICPs; and that punitive action against the ICPs is unwarranted. RCAGC Petition at 18, 20; ITT Petition at 19-22; ITT Reply at 6; TRT Petition at 2, 22; TRT Reply at 4; MCI/WUI Petition at 14-17; MCI/WUI Reply at 2-4, 13. WU responds that these arguments are irrelevant because the grant of WU's requested relief was premised solely on the finding that the ICPs were not entitled to the discounts they enjoyed. WU Opposition at 27 n.1.

50. WU is correct in arguing that the order for reimbursement was not a punitive action taken in response to ICP behavior. Indeed, the ICP argument is a gross misstatement of the rationale underlying the *Phase I Reimbursement Order*, as an examination of the text makes clear. The passages at issue read as follows: "To accept the IRCs' argument [that Section 222(e) bars the grant of WU's requested relief] would establish that, by maintaining an intransigent negotiating position, the IRCs could unilaterally extend the low expired rates until the Commission could complete a hearing and prescribe interim or final rates." *Phase I Reimbursement Order*, 102 FCC 2d at 498. "But for the IRCs' erroneous claim that they were entitled to a discount and their refusal to cooperate WU would have been entitled to non-discounted rates from the IRCs. As we indicate in the text, we do not believe the IRCs should benefit from their recalcitrance." *Id.* at 494 n.16.

51. The first statement follows a quote from our *Rejection Order*. We found that we had implicit authority to prescribe rates for the rate hiatus and rejected the ICPs' arguments to the contrary. The ICPs essentially argued that, under Section 222(e), the Commission was powerless to prescribe rates for WU during the period prior to a Commission prescription decision. We rejected such a construction of the statute because it would allow the ICPs unilaterally to postpone just and reasonable rate increases by refusing to negotiate with WU and by protracting the Commission's rate investigation as long as possible.[19] In referring to that language in the *Phase I Reimbursement Order*, we did not intend to suggest that the ICPs in fact engaged in contumacy, but only that our acceptance of their argument would create a situation in which they stood to profit from such behavior. The *Phase I Prescription Order* does not base its award to WU on the conduct of the ICPs. The ICP and other arguments mentioned above are therefore dismissed as irrelevant.

3. Equitable Estoppel; Detrimental Reliance

52. The ICPs contend that WU is estopped by its own arguments before the Commission from seeking reimbursement. RCAGC cites several occasions in which counsel for WU argued that the Commission has no power to order retroactive adjustment of division formulae. RCAGC Petition at 6-10. Moreover, RCAGC argues that, in comments submitted in support of the 1979

interim prescription, WU "explicitly proposed a compromise solution which included the abandonment of retroactive relief " *Id.* at 14. RCAGC then contends that, in reliance upon these assertions by WU, it "refrain[ed] from preventative action against the possibility that additional funds would later have to be paid to Western Union." *Id.* at 20. In a related argument, TRT argues that the retroactive refund requirement has a considerably harsher impact on the ICPs than a prospective adjustment of divisions would have. TRT claims that, if the ICPs were given adequate notice, they could have minimized the impact of a WU rate increase by raising their own rates, implementing cost-cutting programs, or redirecting their operations to decrease the use of WU's networks. TRT also alleges that the ICPs' earnings are at an historic low, and that what might have been an equitable solution in 1978 is now unduly harsh. TRT Petition at 5-8; TRT Reply at 5. The ICPs then claim that, because WU changed its position in the course of this proceeding, and because the ICPs relied on WU's earlier arguments, thereby exposing themselves to considerable harm, equity demands that WU be estopped from asserting its claim for reimbursement.

53. In reply, WU acknowledges that, prior to the *Interim PrescriptionOrder*, it did argue against retroactive rate prescriptions or adjustments. WU states, however, that its arguments at that time did not give the ICPs reason to assume that WU would not pursue payment of the full public rates for outbound interconnected traffic during the period at issue. In arguing that the ICPs were on notice that WU would press its claim for reimbursement, WU cites an ICP joint motion, filed on January 19, 1979, asking the Commission to accept a proposed rate agreement with WU (the proposed agreement was rejected in the *Rejection Order*). In that motion, the ICPs stated that, if the agreement is accepted, "[t]he IRCs will avoid the risk of having to pay the full domestic rates during the period covered by the Agreements [January 1, 1978 to December 31, 1979]." WU Opposition at 22-24. WU also contests the ICP argument that equity demands that WU be estopped by its change of position because the ICPs "have completely reversed *their* position on the question of the Commission's power to apply the finally prescribed divisions retroactively " *Id.* at 22 n.1 (emphasis in original). Finally, WU denies that it proposed a compromise solution in which it abandoned its claim for retroactive relief. In reply, RCAGC contends that WU first pressed its claim for retroactive relief in its October 1983 Petition for Reconsideration. RCAGC Reply at 3-4.[20]

54. The pleadings filed by the parties involved in this case have displayed vicissitude from the inception of CC Docket 78-97. The record in this proceeding is rife with reversals, illustrated in the *Initial Decision*. At that time, the ICPs argued for retroactive refunds and interest, arguments diametrically opposed to their position in this case. *See* 95 FCC 2d at 948-53. In light of this record, the ICP argument that WU's reversal of position merits estoppel does not withstand scrutiny. The ICPs have failed to show that they were unaware of WU's ability or intention to pursue the relief granted in the *Phase I Reimbursement Order*. TRT's allegation that WU first sought reimbursement in 1983 is an egregious misstatement. In fact, on the same page of its Reply that it makes that statement, RCAGC cites the court in *WUI v. FCC*, stating that, when the CC Docket 78-97 investigation was terminated, "WU may also assert its claims for any restitutionary relief to which it believes it is entitled." RCAGC Reply at 4, quoting 653 F.2d at 146. It is therefore clear that WU argued its claim for retroactive relief before the District of Columbia Circuit Court of Appeals in 1980, well before WU filed its 1983 Petition for Reconsideration. Similarly, the *Phase I Reimbursement Order* contains a detailed analysis of the record in CC Docket 78-97, and concludes that the ICPs "were well aware of the possibility that they eventually would have to make the reimbursement now considered." 102 FCC 2d at 499-501. We therefore reject the ICP allegations of detrimental reliance as nothing more than disagreements with this finding. Because we will not reconsider our finding that the ICPs had notice that WU would pursue its claim for reimbursement, the ICPs will not now be heard to argue that their failure to make provisions for such an award gives them an argument in equity against WU.

4. Consistency with Other Commission Actions

55. The ICPs argue that our grant of retroactive relief to WU is inconsistent with other Commission actions in CC Docket 78-97. First, they state that the *Phase I Reimbursement Order* effectively undoes our decision in the *ICP Telex / TWX Order* because it establishes by prescription rates that were rejected as proposed tariff revisions. The decision to prescribe the outbound rates retroactively to January 1, 1978 is also deemed inconsistent with our handling of the inbound rates, which were originally proposed to become effective in May 1978 and were suspended until August 1978. ITT Petition at 23; MCI/WUI Petition at 18-19; RCAGC Petition at 4. In addition, ITT argues that the allowance of retroactive relief to WU would increase WU's rates of return to 25.9 percent in 1978 and 20.29 percent in 1979, in contravention of the 18.92 percent previously established by the Commission for the Phase I period. ITT states that the methods it used to compute these returns, while rejected for future prescription purposes in the *Phase I Final Decision*, are appropriate for use in this context. ITT Reply at 7; *see* TRT Reply at 4-5.

56. The ICPs are correct in noting a dissimilarity in our treatment of inbound and outbound rates. In the *ICP-Telex / TWX Order*, we noted that former Section 222(e) required that we accord inbound and outbound rates different regulatory treatment, and found this to be "an unfortunate and confusing situation, which we believe is not in the public interest." 68 FCC 2d at 118. Nevertheless, we concluded that, absent congressional action, we had to comply with the dictates of the statute as drafted. As noted *supra* at paras. 4-6, rates for inbound interconnected service were established using the normal procedures, and outbound rates were prescribed following completion of a rate investigation, as required by the statute. WU could not establish new outbound rates through tariff revisions, and therefore the proposed and actual effective dates for WU's inbound rates are irrelevant. Because the statute required that we set rates by prescription absent carrier agreement, and because the statute does not allow effective rates during a rate hiatus, we made our final rate prescription retroactive to January 1, 1978. Also, the fact that, following our rate investigation, we prescribed the rates originally proposed by WU, does not undo our earlier rejection of WU's proposed tariff revisions. As explained *supra* at para. 26, the two methods of setting rates cannot be compared, and the

identity of the proposed and prescribed rates is irrelevant. Finally, we reject ITT's claim that the ordered reimbursement will result in excessive earnings for WU. We find that ITT's claim is conclusory and wholly unsupported. The ITT argument also seeks to relitigate determinations made in the *Phase I Final Decision* and upheld on appeal in *FTCC v. FCC*, and must be dismissed.

5. Mootness

57. MCI/WUI argues that the instant dispute arose over eight years ago, under a different Commission, a different statute, and in an industry significantly different from the one in which today's carriers operate. As such, MCI/WUI argues, the issues raised in this case are wholly irrelevant to the needs and concerns of the industry at present, and therefore, the case should be dismissed as moot. MCI/WUI Petition at 5-6; MCI/WUI Reply at 14. WU responds that the MCI/WUI argument is conclusory and wholly without merit. The controversy with respect to the amounts that should have been paid in the 1978-1979 period clearly is not moot in the usual sense. Moreover, no cogent argument has been made that failing to resolve that controversy in the instant proceeding would serve the public interest. Conversely, we believe that the summary dismissal of a dispute that has consumed substantial Commission and carrier resources would disserve the public interest.

6. Assignment and Computation of Interest

58. The ICPs aver that we should exercise our discretion and refuse to apply interest in this case. The ICPs list a number of factors in support of this argument, including assertions that the dispute was one involving complex issues over which reasonable parties could honestly differ, that the ICPs' conduct was not culpable and that there was a long delay before the rate issue was resolved. RCAGC Petition at 23; RCAGC Reply at 8; MCI/WUI Petition at 21-23. In addition, RCAGC argues that, if interest is required, it should accrue from October 1983, the date WU filed its Petition, and not from January 1978. RCAGC Petition at 23. Finally, TRT argues that we should not adopt the rates prescribed by the Internal Revenue Service (IRS) because these rates are "much higher than Western Union's company-wide rate of return over the intervening years." TRT Petition at 7 n.1. WU replies that, "when ordering refunds in rate cases, it has been the Commission's established policy to include interest at the IRS rate." WU Opposition at 35. WU also argues that the ICP argument should be "given short shrift" because they requested, and were granted, interest at the prime rate in the *Interim Decision*. *Id.* at 36.

59. In its Opposition, WU correctly cited our decision in *American Te. & Tel. Co.*, 89 FCC 2d 369 (1982), *affirmed sub nom. RCA Global Communications, Inc. v. FCC*, 717 F.2d 1429 (1983), for the proposition that it has been our practice to require interest at the IRS rate when ordering refunds. Interest traditionally has been considered necessary to restore the aggrieved party to the status quo ante, and we find that such relief is appropriate in the instant case.

IV. CONCLUSION; ORDERING CLAUSES

60. We understand that a retroactive rate prescription is a drastic and unusual measure, and it is one we have taken only after serious deliberation, to remedy a gap in the ratemaking procedures set forth in Section 222. Section 222(e) provides that rates for outbound service only be established either by joint agreement of the parties, or absent an agreement, by Commission prescription following a hearing. Under Section 222(e), the combination of the inability of the parties to agree on rates, and the fact that the Commission was required to hold hearings to prescribe them, resulted in the anomalous development of a rate hiatus between January 1, 1978 and July 24, 1979 – a period during the pendency of the Commission's investigations to determine lawful rates for outbound service.

61. Section 222(e) does not explicitly address this period of rate hiatus. However, now that we have concluded our Section 222(e) investigation and determined that the rates are just, reasonable and equitable for the period after July 24, 1979, we believe that it is consonant with our implicit authority under Section 222(e) and our powers under Section 4(i) of the Act to establish the rates that are just, reasonable and equitable for the preceding period of rate hiatus. We note that we had no obligation to set rates for the period of rate hiatus that were equal to the rates set for the period after July 24, 1979. However, because the court in *FTCC v. FCC* has upheld our determination that the ICPs were not entitled to any discount for service, we believe that the rates WU charged under its public tariff constitute a just, reasonable and equitable charge during the period between January 1, 1978, when the parties' contract expired, and July 24, 1979, when an interim rate prescription was entered in this proceeding. As discussed at length in this Order and in the *Phase I Reimbursement Order*, we also believe that the equities in this case do not weigh against retroactive relief. The ICPs proceeded at their own risk when they unilaterally set and demanded the discounted rate during the hiatus period, over the objections of Western Union. In these unique circumstances, we think the carriers could not have reasonably assumed that their power to dictate was completely immune from adjustment by the Commission pursuant to its prescriptive powers.

62. For the reasons discussed above, we find that petitioners have failed to present us with arguments sufficient to merit reconsideration of the *Phase I Reimbursement Order*.

63. Therefore, IT IS ORDERED that the Petitions for Reconsideration filed by ITT World Communications Inc.; MCI International, Inc. and Western Union International, Inc.; RCA Global Communications, Inc. and TRT Telecommunications Corp. ARE DENIED.

64. IT IS FURTHER ORDERED that the Request for Acceptance of Attached Affidavit and the Request for Acceptance of Attached Reports to Auditors filed jointly by MCI International, Inc. and Western Union International, Inc. ARE DENIED.

65. IT IS FURTHER ORDERED that the Comments filed by FTC Communications Inc. ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] The Western Union Telegraph Co., CC Docket No. 78-97, Phase I, 102 FCC 2d 485 (1985)(*Phase I Reimbursement Order*).

[2] The ICPs are ITT World Communications, Inc. (ITT); MCI International, Inc. and Western Union International, Inc. filing jointly (MCI/WUI); RCA Global Communications, Inc. (RCAGC) and TRT Telecommunications Corp. (TRT). The acronym "ICP" has been adopted by various interconnected record carriers, which frequently file joint petitions or concur in each other's separately-filed pleadings. The term "ICP" does not denote a fixed number of carriers, rather, its membership varies with different proceedings, depending on which carriers participate. In addition, the ICPs formerly referred to themselves as the international record carriers (IRCs), a term that became outmoded after 1981, when the carriers began offering domestic, as well as international service. We note that this Order will cite to Commission Orders and court decisions in three interrelated proceedings: CC Docket No. 78-97, Phase I, CC Docket No. 78-97, Phase II, and CC Docket No. 82-122. Reference to the ICPs or IRCs in these proceedings may include carriers other than the five mentioned above. Moreover, reference to ICPs or IRCs in previous proceedings will not include MCI, which has only recently joined the ranks of the ICPs. In the interest of clarity and brevity, reference to arguments made by the ICPs or IRCs will refer to arguments attributable to ITT, RCAGC, TRT and WUI unless noted otherwise.

[3] Our finding in the *Phase I Reimbursement Order* that these contracts expired is at issue in this proceeding and will be discussed in detail in this Order.

[4] The Western Union Telegraph Co., CC Docket No. 78-97, 67 FCC 2d 1420 (1978).

[5] The Western Union Telegraph Co., 68 FCC 2d 98 (*ICP Telex / TWXOrder*), *reconsideration denied,* 69 FCC 2d 924 (1978), *petition for review dismissed sub nom.* Western Union International v. FCC, 652 F.2d 136 (D.C. Cir. 1980)(*WUI v. FCC*).

[6] The version of Section 222 in effect during the period in question was repealed by the new Section 222, Part Two, of the Record Carrier Competition Act of 1981 (RCCA), P.L. 97-130, 95 Stat. 1687. Former Section 222, however, remains the applicable statute for purposes of resolving the instant disputes, and all references to Section 222 in this Order will indicate former Section 222. The relevant parts of that statute read as follows: (e)(1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: Provided, however, That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection (3) Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carrriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers.

[7] The Western Union Telegraph Co., CC Docket No. 78-97, 71 FCC 2d 621 (1979)(*Rejection Order*).

[8] The Western Union Telegraph Co., CC Docket No. 78-97, Memorandum Opinion and Order Prescribing Interim Division of Charges for Outbound International Record Carrier Traffic, FCC 79M-845, released July 24, 1979 (*Interim Prescription Order) review denied*, The Western Union Telegraph Co., CC Docket No. 78-97, FCC 79-182, released Dec. 13, 1979, *petition for review dismissed sub nom.* TRT Telecommunications, Inc. v. FCC, No. 79-2524 (D.C. Cir. Dec. 19, 1980).

[9] The Western Union Telegraph Co., Initial Decision in Phase I of CC Docket No. 78-97, 95 FCC 2d 924 (1982) (*Initial Decision).*

[10] The Western Union Telegraph Co., CC Docket No. 78-97, Phase I, Final Decision, 95 FCC 2d 881 (1983)(*Phase I Final Decision*), *petition forreview denied sub nom.* FTC Communications, Inc. v. FCC (*FTCC v. FCC*), 750 F.2d 226 (2d Cir. 1984).

[11] WU includes in its Opposition to the ICP petitions for reconsideration a statement that MCI should not be considered a party to this proceeding because it lacks "standing" as required in Section 1.106(b)(1) of our Rules, 47 C.F.R. § 1.106(b)(1). MCI and WUI filed their Petition jointly, and prefaced the Petition with a statement that WUI was a wholly-owned subsidiary of MCI. We find that MCI has established adequately its interest in this proceeding, and that no purpose would be served in granting WU's request to construe the Petition as filed by WUI alone.

[12] MCI/WUI also filed a "request for acceptance of attached affidavit" on October 29, 1985, and a "request for acceptance of attached reports to auditors" on November 1, 1985. The former consists of an affidavit of WUI's Director of Finance, which supports arguments made in the MCI/WUI Petition and Reply. The latter includes reports purporting to show that WU certified that WUI did not owe WU any amounts for the period at issue in this proceeding. We reject the petitions to accept these documents because they are untimely submissions and because they do not add to the arguments presented in the MCI/WUI Petition and Reply. The affidavit is duplicative of arguments already well documented. The relevance of the report to the auditors is not explained. Rather, MCI/WUI makes the unsubstantiated assertion that the reports are "relevant to issues now before the Commission." Because these filings are duplicative and of dubious relevance, their exclusion from consideration in this proceeding will not prejudice MCI/WUI's case.

[13] In addition, FTC Communications Inc., (FTCC) filed "comments" in support of the ICP petitions for reconsideration. These comments were filed over three weeks after petitions for reconsideration were due, and were not accompanied by a petition to accept a late-filed submission. WU filed a motion to strike the FTCC comments as untimely filed. FTCC opposed the motion to strike. We grant WU's motion to strike the FTCC comments as untimely under Section 1.405 of the Commission's Rules, 47 C.F.R. § 1.405.

[14] We note that ITT also contests our application of Cleveland v. FPC, 525 F.2d 845, 854 (D.C. Cir. 1976). ITT Petition at 19-20. Because ITT voices no new arguments in support of its interpretation of this case, but merely asserts its disagreement with our position, we will not consider its argument here.

[15] The *Brimstone* Court clearly stated that the decision was not an absolute bar to implied authority to effect retroactive adjustments: "The power to require readjustments for the past is drastic. It may reasonably exist in cases where the particular rate has been approved by the Commission after full hearing; it ought not to be extended so as to permit unreasonably harsh action without very plain words." 276 U.S. at 122. As we explain elsewhere in this Order, the highly unusual circumstances of this case and the narrowly circumscribed use of our authority to adjust divisions retroactively assure that the *Phase I Reimbursement Order* is not unduly harsh.

[16] 544 F.2d 87, 91 (2d Cir. 1976), *cert. denied*, 434 U.S. 903 (1977).

[17] 454 F.2d 1018 (D.C. Cir. 1971).

[18] The ICPs allege that WU was responsible for the rate hiatus because it attempted to increase its outbound rates by a tariff filing rather than by filing a complaint with the Commission. Besides offering this argument to exculpate themselves from any responsibility for the delay in the effectiveness of the increased rates, the ICPs also suggest that WU should be denied equity for its perceived part in creating the rate hiatus. We reject the assertions that WU was primarily responsible for the rate hiatus and that it could have effected a rate increase earlier by more timely or different action. (We note that, in the *ICP Telex / TWX Order*, we treated the proposed tariff revision as a complaint pursuant to Section 222(e)(3). 68 FCC 2d at 121.) In any event, as explained in the text, fault was not a factor in granting WU's request for reimbursement, and these allegations directed at WU are irrelevant.

[19] The Second Circuit Court of Appeals accepted this rationale and referred to this scenario in affirming our decision to impose interim rates during the pendency of the CC Docket 78-97 investigation. *FTCC v. FCC*, 750 F.2d at 232. *See* para. 29, *supra*.

[20] RCAGC also asserts that "another example of waiver, proving estoppel" is WU's failure to bill the ICPs at increased rates for outbound interconnected service following its public rate increases of August 10 and October 1, 1978. RCAGC Reply at 7. WU contends that it did not raise these rates because such action would flout the Commission's *ICP Telex / TWX Order*, which rejected WU's tariff provisions relating to outbound service. We accept WU's argument. That Order firmly established that, under Section 222(e) of the Communications Act, WU could not increase its rates for outbound interconnected traffic by tariff revision. The fact that WU abided by that Order, and did not attempt to increase its charges in spite of our clear finding on this point, can hardly be construed as a waiver of its claim.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 85-94

In re Applications of

PENTECOSTAL REVIVAL ASSOCIATION, INCORPORATED — File No. BPCT-841015KN

PALATKA TELEVISION, INC. — File No. BPCT-841129LK

For Construction Permit
for a New Television Station
Palatka, Florida

Appearances

Eugene T. Smith on behalf of Pentecostal Revival Association, Incorporated; *Seymour M. Chase*, *Robert A. Zauner*, and *John Schauble* on behalf of Palatka Television, Inc.

DECISION

Adopted: November 17, 1986; Released: November 26, 1986

By the Review Board: MARINO (Chairman), JACOBS, and BLUMENTHAL.

Board Chairman MARINO:

1. A trial-type comparative hearing was held to select a broadcaster for a new UHF television station in Palatka, Florida. Presiding Administrative Law Judge Frysiak then found that Palatka Television, Inc., was "clearly to be preferred over" Pentecostal Revival Association because 100% of Palatka's ownership would participate full-time in the management of the station whereas only 20% of Pentecostal's ownership was entitled to similar credit. *Initial Decision*, FCC 86D-39, released May 22, 1986, (ID para. 55). Pentecostal has filed an 8-page brief urging that it should have been given more than 20% ownership participation credit, and that Palatka should receive *no* ownership credit and its application should be denied. Our review confirms that the ALJ correctly applied controlling principles to the facts of record, and we affirm his decision.

2. Pentecostal first makes a half-hearted attempt to challenge the ALJ'S findings that is only entitled to 20% ownership participation credit. Br. at 3-4. It urges that the ALJ failed to divine that Pentecostal's television application and its "church activities are one and the same." Br. at 2. Thus, for example, with regard to its proposed general manager, "the majority of Dolly Harrell's church activities take place at PRA's church. The praying, the marrying, the burying, the preaching, and production of taped television shows take place at PRA's church, and at this same location, PRA's studio will be located". Acknowledging that "she may be wearing many hats," Pentecostal urges that Harrell did testify that volunteers are available to perform many of her other duties, and that she would spend "in excess of 40 hours per week.... as general manager." Br. at 4.

3. An applicant with other interests which seeks full-time credit must set forth "*in some detail*" its integration proposals and "*specifically allocate*" time so as to accommodate the other interests and still effectuate its broadcast proposal. *Central Texas Broadcasting Co.*, 90 FCC 2d 583, 596 (Rev. Bd. 1982) (subsequent history omitted). Because of the superficial consistent with past precedents, a principal who proposes to work substantially more than 70 to 80 hours per week may not receive credit for proposing to be the station's full-time general manager. ID para 48. Similarly, the record supports the ALJ's finding that two of Pentecostal's other principals will not be integrated into meaningful management positions. ID para. 49-50. These principals will perform the functions of set construction and bookkeeping which simply do not qualify as management under the established comparative precedent cited by ALJ. Finally, no attempt is even made to rehabilitate another principal,- Pentecostal's "Director of Spanish Ministries," whose proposed station role also was not credited as managerial. ID para. 51.

4. Pentecostal's real hope rests on its argument that "that appeal must be decided on the basis of the rulings in KIST Corp.," 99 FCC 2d 173 (Rev. Bd. 1984), *modified*, 102 FCC 2d 288 (1985) (subsequent history omitted). It urges that "Based upon the facts of record, and the pronouncements of law set forth in the *KIST* cases," *supra*, the application of Palatka Television "must be denied." Br. 7. Pentecostal urges that Palatka's preincorporation agreement establishes that the legal authority to construct the stations rests in the hands of two non-voting stockholders, J.A. Ginn, Jr. cannot purchase a light bulb without [their] written consent..." (Br. 7). Pentecostal claims that the preincorporation agreement shows that without the consent in writing of the non-voting or passive principals Palatka's application "cannot be (a) withdrawn, (b) dismissed, (c) merged, (d) PTI cannot incur indebtedness, (g) PTI cannot declare or pay dividends, (f)PTI cannot guarantee indebtedness, (g) PTI cannot declare or pay dividends except out of operation profit, (h) cannot sell more than twenty (20) percent of its assets, can a transfer of a substantial portion of PTI s business occur, (j) PTI cannot amend its Articles of Incorporation so as to effect any change to the detriment of Messrs. Ginn and Cone, and (k) PTI cannot make any loan of corporate funds, or extend PTI's credit for a debt without the written consent of Messrs. Ginn and Cone." (Br. at 7).

5. Our review of the written agreement confirms the accuracy of Palatka's reply that its voting principals may borrow funds for the construction and operation of the proposed station, and that the only limitation is that the expenses be "legitimate and prudent." Reply Br. at 2-7. Thus, Section 7.l(b) of the agreement provides that: "The Corporation shall not incur, assume, or guarantee indebtedness for *other than legitimate and prudent expenses* incurred in the formation of the corporation, the preparation, filing, and prosecution of the application, and the construction and operation of the station." (Emphasis added). The other restrictions in the agreement, on which Pentecostal relies, are of the type which

have been found "to afford some degree of protection to non-voting investors." *Marrow Enterprises, Inc.*, 102 FCC 2d 234, 339-340 (Rev. Bd. 1985). *affirming* 102 FCC 2d 342, 351 (ALJ 1985). Such provisions against withdrawal, merger, or dismissal of the application or selling of more than 20% of the assets without consent of passive principals have been found not to restrict the "day-to-day operation and control of the proposed station." *Id.* Moreover, as noted by the Court of Appeals in our leading case on the subject: "[O]n questions such as proposed merger, dissolution, change in the non-voting stock's par value, or issuance of a new class of preferred stock... these limited rights do not threaten the ability of voting shareholders to control the management of the corporation." *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd 1982, *rev. denied*, FCC 83-235, May 18, 1983, *affirmed*, 732 F. 2d 962, 971 at n. 9 (D.C. Cir. 1984). In sum, the ALJ did not err in rejecting Pentecostal's argument that the non-voting or passive stockholders would control the corporation, and in awarding full credit for the proposed integration of all of Palatha's voting stockholders.

6. ACCORDINGLY, IT IS ORDERED, That the application of Pentecostal Revival Association, Incorporated IN DENIED, and the application of Palatka Television, Inc. (File No. BPCT-841129LK) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

SPANISH INTERNATIONAL COMMUNICATIONS CORPORATION	MM Docket Nos. 83-540 to 83-544 and 84-830 to 84-834
For Renewal of license of: KWEX-TV San Antonio, Texas, et al.	File Nos. BRCT-830401LM et al.
BAHIA DE SAN FRANCISCO TELEVISION COMPANY	MM Docket No. 83-545 File No. BRCT-800730KJ
For Renewal of license of: KDTV (TV) San Francisco, California	
THE SEVEN HILLS TELEVISION COMPANY	MM Docket Nos. 83-657 and 84-835 File Nos. BRCT-830601KJ and BPTT-840308IQ
For Renewal of license of: KTVW-TV Phoenix, Arizona, et al.	

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1986 Released: November 26, 1986

By the Review Board:

1. The Board has before it (1) a Petition for Reconsideration filed November 10, 1986 by Spanish American League Against Discrimination (which styles itself "SALAD") directed against our *Memorandum Opinion and Order* (hereinafter "*SICC*"), FCC 86R-64, released October 9, 1986, under the above styled caption; and (2) a Petition to Intervene or in the Alternative for a Waiver of the Rules and a Petition for Reconsideration filed on November 10, 1986 by Hispanic Broadcasting, Ltd.

2. We had previously dismissed SALAD's request to intervene for the reasons partly explained in note 1 of these margins, but especially because its grossly untimely intervention request was inconsistent with the requirements of 47 CFR 1.223. *See generally Committee for Community Access v. FCC*, 737 F.2d 74, 83-84 (D.C. Cir. 1984). We see no greater basis at law for responding to its Petition for Reconsideration, except to recognize the unusual procedural circumstances set forth in note 1, *supra*.

3. While the SALAD petition is clearly defective from a procedural standpoint and justifiably dismissable on that basis alone [2], we have decided to entertain jurisdiction over the reconsideration pleading not only to address SALAD's legal arguments but, perhaps more importantly, to clarify our reasoning and our result in *SICC*. For that purpose, the SALAD petition provides, if nothing else, a convenient medium. [3]

4. First, SALAD asserts that "radio station licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated on basic qualifications issues, are *forbidden* to transfer control of these licenses." [4] It asserts that, but for certain prior exceptions referenced in paras. 2-4 of our *SICC* order, the general policy against the allowance of a license transfer described in *Jefferson Radio Co., Inc. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964), and iterated in para. 2 of our order, is hidebound, and that our settlement approval was therefore violative of Commission policy. SALAD's stated view of applicable law and policy is both overly simplistic and incomplete.

5. The Board is fully aware of the strictness with which the Commission has applied its *Jefferson Radio* general policy, and it has so reported. *See SICC* at paras. 2-4; *cf. West Jersey Broadcasting Co.*, 90 FCC 2d 363, 371-373 (Rev. Bd. 1982). But, the Commission's general policy is not, nor could it legally be, as impermeable as SALAD initially suggests (and later in its brief concedes). Thus, as recited at para. 2 of our *SICC* order, the general policy - as recently related to the court - is not an absolute, but does strongly disfavor transfer where basic license qualifications are unresolved "*unless other factors indicate that the transfer is in the public interest.*" FCC Brief at 3 n. 5, *Anthony R. Martin-Trigona v. FCC*, No. 84-1229 (D.C. Cir 1984) (emphasis added). This inbuilt "public interest" exception may be as much mandatory as discretionary. For we noted the fact that, despite the Commission's reliance on the *Jefferson Radio* general policy, the court in *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974), rejected that reliance and sharply reminded the Commission that a brittle application of that general policy "does little to accommodate the Commission's mandate to regulate in the public interest. This mandate is as broad as it is difficult to define." *Id.*, at 1146-1147 n. 2 (quoted *SICC* at para. 4) Indeed, the court has long monished that however valid may be an administrative rule or policy when established in the universal, the presumptions of validity which support that general rule or policy nonetheless benefit by "a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Said the *WAIT Radio* court:

> "The salutary presumptions do not obviate the need for serious consideration of meritorious applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the 'public interest.' That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases."

Id. That is the identical point made by the circuit in *LaRose*, *supra*. While exemptions and waivers to a general rule or policy may not be made willy-nilly or without a

good reason for the exemption, *Basic Media, Ltd. v. FCC*, 559 F.2d 830, 833 (D.C. Cir. 1977), the mere existence of a general rule or policy, otherwise valid, does not spare the agency the obligation of giving nonfrivolous requests for exemption or waiver a "hard look." *WAIT Radio, supra*, 418 F.2d at 1157. [5] While SALAD's pleading initially asserts that "[c]ontrary to the Board's claim, the Commission has established only three *limited* exceptions" to the general policy reflected in *Jefferson Radio*, [6] it later cites and recognizes the much more recent case of *George E. Cameron, Jr. Communications*, 56 RR 2d 825 (1985), [7] which is clearly outside the "three *limited* exceptions" urged as exclusive by SALAD. Additionally, these three routine exemptions neither are, nor could be (*see WAIT Radio, supra*), nor have been *absolute*. Thus, for example, the Commission in 1974 permitted a party whose license had been designated for hearing on basic qualifying issues to assign its license rather than face disqualification. Stating that the licensee "now proposed not to continue as a licensee" and wished to "expeditiously withdraw from broadcasting," the Commission permitted that licensee to sell its station, despite the existence of outstanding hearing issues going to that licensee's basic qualifications. *Radio San Juan, Inc.*, 45 FCC 2d 375, 376 (1974). A similar situation exists in the case at bar. And, most recently (as we noted in *SICC* at n. 13), the Commission ordered the initiation of settlement negotiations in *RKO General, Inc.*, FCC 86-383, released September 12, 1986, despite the existence of basic disqualifying issues outstanding against that licensee. What SALAD fatally neglects to note, apart from *WAIT Radio's* requirement that we give a "hard look" to requests for exemption from general rules or policies, is that the Commission is "vested with broad discretion in [its] choice of remedies and sanctions." *WMOZ, Inc.*, 7 RR 2d 373, 375 (1966). The Commission need not, nor may it, fly on automatic pilot; it must carefully adjudicate on a case-by-case basis, always tailoring its remedies to serve the larger "public interest." *LaRose v. FCC, supra.*

6. SALAD next objects to our references to *LaRose v. FCC, see SICC* at paras. 4, 7, as a basis for taking notice of the actions of United States District Court Judge Mariana R. Pfaelzer in *Fouce Amusement Enterprises, Inc.*and *Metropolitan Theaters Corp. v. SICC, et al.*, Case No. CV76-3451 MRP (C.D. Cal.), in making our judgment as to whether grant of the settlement submitted to the Board was consistent with Commission policy and the public interest. In *LaRose*, the court was focused upon our (so-called) *Second Thursday* [8] exception to the general policy reflected in *Jefferson Radio*. Finding the Commission's negative action to be essentially inconsistent with its *Second Thursday* doctrine, the *LaRose* court reemphasized the "public interest" concern of federal bankruptcy court proceedings "in protecting innocent creditors," 494 F.2d at 1148, and the court reversed the Commission's refusal to grant the assignment of a troubled license to the receiver-in-bankruptcy. Our *SICC* reference to *LaRose* intended this: much as federal law and the federal courts have processes to protect "innocent creditors," Judge Pfaelzer's mediatory actions and her specific approval of the particular settlement agreement in *Fouce Amusement* was intended to protect certain minority stockholders of SICC. In fact, Judge Pfaelzer's approval of the specific settlement was not mere passive acceptance; rather, as represented to the Commission by an opponent of the concurrent SICC license transfer applications, the *Fouce Amusement* court formally established a Sales Committee to seek offers for the SICC stations, and the court itself selected the particular bidder to whom SICC here proposes to transfer the licenses as that bid best protecting those certain minority SICC stockholders. [9] Judge Pfaelzer's careful and prudent ministrations to protect certain minority stockholders of SICC are entitled to no less deference or respect, we believe, than a receiver's actions to protect "innocent creditors." Indeed, there is a clear parallel: both authorities, acting under the aegis of federal law, sought to protect certain financially interested parties from unjust economic castastrophe, and to salvage the most value from the transfer of broadcast licenses. And, the "innocent creditors" of *LaRose* may be culpable of no more, or less, than those certain minority SICC stockholders seeking redress in *Fouce Amusement*: bad business judgments. The *LaRose* court sought to protect the former by suggesting that the FCC permit the sale of the jeopardized license; the *Fouce Amusement* court sought to protect the latter by its appointment of a Sales Committee, its selection - subject to FCC approval - of the particular transferee, and by its approval of the very settlement agreement which formed the basis for the specific settlement agreement presented to the Board. We suppose that there exist distinctions between the efforts and intentions of the bankruptcy receiver of concern in *LaRose* and the Federal District Court presiding over *Fouce Amusement*, but can illuminate no significant "public interest" reason why the Commission should show solicitude for the protective efforts of one federal authority and not the other. Particularly when the *LaRose* court expressly reminded the Commission that the "public interest" standard which is the touchstone in its deliberations over whether or not to permit the transfer of a troubled license "is as broad as it is difficult to define," [10] and went on to recall [11]:

> "Administrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest."

We believe that our consideration of the *Fouce Amusement* court's actions was certainly proper, as part of our larger consideration of the Commission's public interest policies and precedents in this area of the law. While the agreement approved by the *Fouce Amusement* court is not, of course, binding on the FCC, it is nonetheless entitled to "public interest" consideration, as are the minority stockholders seeking protection in that case.

7. SALAD next argues that the "[t]he 'unusual complex' considerations presented in *Cameron*" are not present here, [12] and that "[n]o special equities are present" either. [13] We disagree. A perusal of the ALJ's initial decision in this case, and of the voluminous exceptions, attests to the enormous complexity of the factual and legal issues pregnant here, all relating to whether or how much *de facto* control was exerted by certain alien stockholders of SICC. The answers depend upon inferences, highly subjective, to be drawn from a very complex pattern of interlocking relationships, to which the ALJ devoted fully 151 paragraphs of findings of fact. [14] Compared to the factual and legal complexities of this case, *Cameron* was child's play. And, it is a good deal more unusual in that although the adjudicated usurpation of *de facto* control in *Cameron* was a blatant violation of 47 U.S.C. 310, as well as in direct violation of prior, express warnings to the *Cameron* li-

censee, the same ALJ himself was here uncertain as to whether SICC's activities, even if viewed most unfavorably, were in substantial violation of that very statutory section. Judge Conlin concluded [15]:

> "Moreover, in what appears to be the most thorough review undertaken by a Federal Court of the legislative history of the statute it was concluded that 'although [Section 310(b)] was directed against alien control of our communications facilities, this limitation was primarily based "upon the idea of preventing alien activities against the Government during the time of war."' *Noe v. FCC*, 260 F.2d 739, 741 (D.C. Cir. 1958), *cert.denied*, 359 U.S. 924 (1959). Thus, it cannot be said that the violations found in this case go to the very heart of the statutory proscription."

SALAD's suggestion that the instant case is *not* highly unusual is belied not only by the facts and circumstances surrounding this proceeding, it is squarely contradicted by its own pleadings which assert [16]:

> "In the normal hearing case there would be no need for SALAD to intervene at this point of the proceeding. It should be clear by this time, however, that this is *not the typical case...* ."

As to equities, we observed that the basic alien ownership and interlocking relationships giving rise to the *de facto* control issue against SICC were a matter of public record at the Commission for more than 20 years. *See generally Spanish International Television Co.*, 5 RR 2d 3 (1965). At anytime during that period, and at the renewal of any SICC license, the Commission could easily have conditioned SICC's licenseeship on an equity divestiture by the alien shareholders and/or on a severance of the interrelationships with SIN as the program supplier. *See, e.g., Telemundo, Inc. v. FCC*, No. 85-1494 (D.C. Cir. decided September 23, 1986), where the court affirmed a Commission action which required the licensee to terminate program supply and consultancy contracts with interested foreign nationals so as to avert *de facto* control questions under 47 U.S.C. 310(b). But no such conditions were ever placed on the grant of an SICC license, despite the glaring similarity of potential for undue alien influence. Indeed, in the prologue to its exceptions to the *I.D.*, SICC accurately points out that it had:

> "made known in public filings with the Commission for at least the last two decades all of the relevant facts the ALJ now finds troubling."

And further that:

> "[h]ad the Licensees ever been advised by the Commission that their arrangements with SIN were viewed as indicia of alien control, they certainly would have taken steps to correct the situation. No such notification was ever forthcoming – the indications were to the contrary."

It was for this reason, in addition to the question of statutory interpretation, that the ALJ found "a draconian element to the outright refusal to renew the applications in this case," *I.D.*, *supra* note 14, at para. 193, and why the ALJ strongly suggested a corporate restructuring as a possible remedy in this unique case. *Id.*, para. 194. Finally, while SALAD argues that, even under the settlement agreement in *Cameron*, the culpable principal suffered a financial hardship, it is here represented that Rene Anselmo - the putative "linchpin in the SICC - SIN - Televisa combine" [17] - "has resigned as president and director of both SICC and Bahia and disposed of his interest in SIN at less than market value" under the *Fouce Amusement* settlement agreement. [18]

8. SALAD also argues that the Board's action was inconsistent with the tenets of the Commission's minority "distress sale" policy, as affirmed by the court in *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026 (D.C. Cir. 1981). Our response is threefold: First, petitioner recognizes that the "distress sale" exemption upheld in *Stereo Broadcasters* represents only one "public interest" exception to the general policy embodied in *Jefferson Radio*, and - as noted *supra* - is not exclusive. *See, e.g., George E. Cameron, Jr. Communications, supra*; *RKO General, Inc., supra*. Nor are the routine physical "impairment" or bankruptcy exemptions. *See, e.g., San Juan Radio, supra.* Second, in the wake of the court's remand of *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir.), and the critical constitutional reasons underlying that remand, it seems likely that the minority "distress sale" policy is, at least temporarily, inoperative. And, third, SALAD itself seeks post-hearing relief (i.e., a compulsory transfer of SICC's licenses to a minority licensee) identical to the relief specifically denied in *Stereo Broadcasters*. Indeed, it must be said that all of SALAD's objections to the SICC settlement, insofar as they vehemently interpose the general policy of *Jefferson Radio*, are more than a little disingenuous, and its pleadings seem intended as much to obstruct and delay as to preclude a post-hearing transfer of the SICC licenses. For it is plain beyond cavil that SALAD does not object in principle to the post-hearing transfer of the SICC licenses, but that the gravamen of its complaint is that the settlement, and our approval thereof, does not compel the sale of the SICC stations to transferees more to SALAD's own liking. Thus, SALAD has previously revealed its actual policy bent by complaining that the approved SICC settlement agreement would permit SICC "to sell its stations at full market value to a non-minority buyer," [19] and it instead urged a remedy of *its own* policy design, to wit [20]:

> "The public interest would be far better served here if the channels were declared vacant or were sold to qualified minority buyers at distress sale prices. Such an outcome would maintain a deterrent effect while promoting minority ownership."

While appreciative of SALAD's concern for increased minority ownership, we again direct its attention to 47 U.S.C. 310(d), which flatly holds that:

> "Any such [transfer] application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public inter-

est, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

That SALAD would have us disregard the clear congressional prohibition of Section 310(d) is obvious, but just as obviously illegal. [21]

9. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed November 10, 1986 by the Spanish American League Against Discrimination IS DENIED [22]; and

10. IT IS FURTHER ORDERED, That the Petition to Intervene or in the Alternative for a Waiver of the Rules filed November 10, 1986 by Hispanic Broadcasting, Ltd. and the Petition for Reconsideration filed November 10, 1986 by Hispanic Broadcasting, Ltd. ARE DISMISSED. [23]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The Board had dismissed SALAD's initial request to intervene, in part, because we had adopted on September 26, 1986, our *Memorandum Opinion and Order, ("SICC")*, FCC 86R-64. However, because of difficulties arising under the Commission's new arrangement with the Department of Commerce, which now prints certain FCC documents, *SICC* was not released until October 9, 1986. SALAD's initial petition was filed on October 3, 1986, at which time our adopted *SICC* was in the hands of the Department of Commerce printers. The Board regrets any inconvenience to the public caused by the new printing arrangement, under which the Board has no control over, or even advance notice of, official release dates.

[2] We will dismiss, and not substantively address, the pleadings of Hispanic Broadcasting, Ltd. Not only is its intervention request grossly out of time and defective under Sections §§1.223 and 1.294 of the Commission's rules, 47 CFR 1.223, 1.294, and not only does it request reconsideration of matters it never raised in the first instance, *see* 47 CFR §§1.106(b)(3) and 1.106(c), its petitions are a "kitchen sink" opera, inconsistently (1) requesting waiver of Section 1.223 so as to allow intervention by way of the Board reconsideration and (2) advising that it has filed a Petition for Waiver with the Commission asking it to assume jurisdiction over the Board's settlement approval. Inasmuch as at least one application for review of the Board's *SICC* has already been filed, *see infra* note 18, it is safe to assume that the Commission will shortly have jurisdiction over the matter under §1.115 of its rules, 47 CFR §1.115. Moreover, numerous petitions to deny the SICC license transfer application, filed contemporaneously with the settlement agreement presented to the Board, have already been filed, *see e.g., infra* note 9, these latter containing arguments substantially identical to those raised by Hispanic's petition for reconsideration, many of which are also addressed herein.

[3] We are aware that the court recently chided the Commission slightly for treating with the merits of a petitioner's arguments when it had good and sufficient procedural reasons for not addressing the substance of those arguments. *New Radio Corp. v. FCC*, No. 85-1462, slip op. at 9 n.15 (D.C. Cir. decided November 7, 1986). Meaning no disrespect whatever, we note that the court itself did not stop at affirming the Commission's procedural holding, but moved to a substantive discussion on the merits, thereby clarifying a very disputed area of law, for which clarification we are sincerely appreciative.

[4] Petition at 3, quoting *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1027 (D.C. Cir. 1981) (emphasis added by petitioner).

[5] Both the courts and the Board recognize the possibility that certain general rules or policies, never having been subject to exemption, are - in essence - "unwaivable." *See Basic Media, supra; Thomas Radio Co. v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *see also FCC v. WNCN Listners Guild*, 450 U.S. 582, 601 n.44 (1981). However, SALAD plainly does not assert that the general policy articulated in *Jefferson Radio* has not been waived on numerous occassions; indeed, its pleadings cite numerous examples of policy exemption cases. In fact, as discussed *infra* at para. 8, SALAD's stated motivation in this proceeding is to acquire a *Jefferson Radio* exemption itself, for a license transferee more to its own liking.

[6] Petition at 3 (emphasis in original).

[7] *Id.*, at 5-6. SALAD therein contends that the Commission intended *Cameron* to be "one-of-a-kind." Apart from the fact that "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated" and that "[t]here may not be a rule for Monday, another for Tuesday," *Basic Media, supra*, 559 F.2d at 833 n.2 (quoting *Mary Carter Paint Co. v. FTC*, 333 F. 2d 654, 660 (5th Cir. 1964) (concurring opinion)), the *Cameron* Commission nowhere indicated that its decision therein was a "one-day limited special," doled out much as a Papal dispensation to that licensee alone. Rather, it did in Cameron what it always does: (1) consider the general policy; (2) as well as the grounds for exemption; and (3) rendered a public interest judgment.

[8] *Second Thursday Corp.*, 22 FCC 2d 515 (1970); 25 FCC 2d 112 (1970).

[9] TVL Corporation Petition to Deny, filed with the Commission September 29, 1986, at 7-16. The SICC license transfer application, filed concurrently with the settlement agreement submitted to the Board, is formally before the full Commission and awaiting action. Because of the overlap of remedies and jurisdiction, the Board was officially served with a copy of TVL's petition.

[10] 494 F.2d at 1146-1147 n. 2.

[11] *Id.*

[12] Petition at 5.

[13] *Id.* at 6.

[14] *See Initial Decision (I.D.)* of Judge John H. Conlin, FCC 86D-1, released January 6, 1986, at paras. 6-157.

[15] *Id.* at para. 193.

[16] Petition for Leave to Intervene, filed November 10, 1986, at 4.

[17] Mass Media Bureau Reply to Exceptions of Initial Decision, filed May 6, 1986, at 4.

[18] Application for Review of Rene Anselmo, filed November 10, 1986, at 2 n.2.

[19] Objection to Joint Petition, filed October 3, 1986, at 2.

[20] *Id.* at 5. The perception that SALAD intends to obstruct or delay the approved settlement is heightened by the fact its latest petition was filed on the very last day of the 30-day reconsideration period.

[21] In this respect, it must be said that SALAD's position is no more digingenuous or illegal, nor less, than that of various other parties seeking now to intervene in this proceeding. *See, e.g.,* TVL Petition to Deny, *supra* note 9 (petitioner seeks sale of SICC licenses to it rather than transferee selected by U.S. District Judge Pfaelzer in *Fouce Amusement, supra); Petition to Intervene,* filed September 26, 1986 by Mexican American Bar Association of Los Angeles County, *et al.,* discussed briefly in *SICC* at n. 14.

[22] SALAD's Petition to Intervene, filed simultaneously, is granted to the extent and for the purposes indicated in paragraphs 2 and 3 of the text, *supra*.

[23] Because our actions here deny and dismiss the several petitions, we need not await, if any, responsive pleadings.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Oversight of the Radio
and TV Broadcast Rules

ORDER

Adopted: November 13, 1986 ;Released: November 26, 1986

By the Chief, Mass Media Bureau:

1. The definitions of the terms allocation, allotment and assignment are found in 47 CFR Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations. See Section 2.1 Terms and Definitions. The function of allocating frequencies for specific services is performed by the Frequency Allocation Branch of the FCC's Office of Engineering Technology.

2. After allocating frequencies for broadcasting purposes, the supervising Mass Media Bureau allots frequencies to geographical areas in the U.S.A. and its territories and possessions for specific services therein. In carrying out its purpose, the Mass Media Bureau prepares and maintains Tables designating i.e., allotting, certain frequency channels, by states, territories and possessions, and by the communities therein, for FM and TV broadcast services.

3. From these Tables, which show the allotment of the frequency channels to the separate geographical locations, assignments are made to applicants who apply to become FM or TV station licensees.

4. The terms "allotment" and "assignment" have been misused in sections of 47 CFR Part 73 in a colloquial, i.e., erroneous, sense for some years. The allotment tables for the FM Services, 47 CFR Part 73, Subpart B and for the TV services in subpart E, have been incorrectly termed "Table(s) of Assignments."

5. Correction of these improper designations was made, in part, in 1983 in the Report and Order in BC Docket 80-90, Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments. 48 FR 29486, June 27, 1983. In paragraph 92 therein, the Commission stated:

"According to the definitions adopted at the 1979 World Administrative Radio Conference (WARC) of the International Telecommunications Union, the term "allotment" rather than "assignment" more closely identifies the designation of a frequency or channel for use in a specific geographic area. Assignment is the authorization of a radio frequency channel for use by an entity under specific conditions. Thus, a channel may be allotted to a community or place but assigned to a licensee. A plan of potential channel designations should be referred to as Table of Allotments. The rules will be amended to denote the Table as the: Table of FM Allotments."

5. Corrections, yet to be made in the TV rules in Subpart E of Part 73, and in rules in other Subparts, will be effected via this Order as shown in the attached appendix.

6. No substantive changes are made herein which impose additional burdens or remove provisions relied upon by licensees or the public. We conclude, for the reasons set forth above, that these revisions to Part 73 will serve the public interest.

7. These amendments are implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. In as much as these amendments impose no additional burdens and raise no issue upon which comments would serve any useful purpose, prior notice of rule making, effective date provisions and public procedure thereon are inapplicable pursuant to the Administrative Procedure Act. 5 U.S.C. §553(b)(3)(B).

8. Since a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

9. Accordingly, IT IS ORDERED, That pursuant to Section 4(i), 303(r) and 5(c)(1) of the Communications Act of 1934, as amended, and Sections 0.61 and 0.283 of the Commission's Rules, Part 73 of the FCC Rules and Regulations ARE AMENDED as set forth in the attached Appendix, effective on the date of publication in the Federal Register.

10. For further information on this *Order*, contact Steve Crane, Mass Media Bureau. (202) 632-5414,

FEDERAL COMMUNICATIONS COMMISSION

James C. McKinney
Chief, Mass Media Bureau

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303

2. Section 73.202, Table of Allotments, is amended by revising note 1 to the channel number designations for the State of Pennsylvania to read as follows:

1 The transmitter for a station operating on Channel 276A at Waynesburg must be located two miles southeast of the community in order that minimum distance separation requirements be met.

3. Section 73.202, Table of Allotments, is amended by revising note 1 to the Channel number designations for the State of Vermont to read as follows:

1 Channels 246 and 251 at Rutland, Vt., are regarded as class B allotments.

4. Section 73.606 is amended by revising the section headnote, paragraphs (a) and (b) and footnote 6 to read as follows:

§73.606 Table of Allotments

(a) *General.* The following table of allotments contains the channels designated for the listed communities in the United States, its Territories, and possessions. Channels designated with an asterisk are assigned for use by non-commercial educational broadcast stations only. A station on a channel identified by a plus or minus mark is required to operate with its carrier frequencies offset 10 kHz above or below, respectively, the normal carrier frequencies.

* * * * *

(b) Table of Allotments.

* * * * *

Footnotes to tables:

* * * * *

6 Stations using these allotments shall limit radiation toward stations on the same channel in Puerto Rico, to no more than the effective radiated power which would be radiated by an omnidirectional radio station using maximum permissible effective radiated power for antenna height above average terrain, at the minimum distances from such stations specified in §73.610(b). The FCC shall consider the status of the negotiations with the appropriate British authorities concerning these allotments when the applications for construction permits come before the FCC.

5. Section 73.607 is revised to read as follows:

§73.607 Availability of channels.

Applications may be filed to construct TV broadcast stations only on the channels designated in the Table of Allotments (§73.606(b)) and only in the communities listed therein. Applications which fail to comply with this requirement, whether or not accompanied by a petition to amend the Table, will not be accepted for filing. However, applications specifying channels which accord with publicly announced FCC Orders changing the Table of Allotments will be accepted for filing even though such applications are tendered before the effective dates of such channel changes.

6. Section 73.609 is amended by revising paragraph (a) to read as follows:

§73.609 Zones

(a) For the purpose of allotment and assignment, the United States is divided into three zones as follows:

* * * * *

7. Section 73.610 is amended by revising paragraphs (a) (b) and (c) to read as follows:

§73.610 Minimum distance separations between stations.

(a) The provisions of this section relate to allotment separations and station separations. Petitions to amend the Table of Allotments (§73.606(b)) (other than those also expressly requesting amendment of this section or §73.609) will be dismissed and all applications for new TV broadcast stations or for changes in the transmitter sites of existing stations will not be accepted for filing if they fail to comply with the requirements specified in paragraphs (b), (c) and (d) of this section.

Note: * * *

(b) Minimum co-channel allotment and station separations:

* * * * *

(c) Minimum allotment and station adjacent channel separations applicable to all zones:

* * * * *

8. Section 73.612 is amended by revising paragraph (a) and the Note following paragraph (b) to read as follows:

§73.612 Protection from interference.

(a) Permittees and licensees of TV broadcast stations are not protected from any interference which may be caused by the grant of a new station or of authority to modify the facilities of an existing station in accordance with the provisions of this subpart. The nature and extent of the protection from interference accorded to TV broadcast stations is limited solely to the protection which results from the minimum allotment and station separation requirements and the rules and regulations with respect to maximum powers and antenna heights set forth in this subpart.

* * * * *

(b) * * *

NOTE: The nature and extent of the protection from interference accorded to TV broadcast stations which were authorized prior to April 14, 1952, and which were operating on said date is limited not only as specified above but is further limited by any smaller separations existing between such stations on said date. Where, as a result of the adoption of the Table of Allotments or of changes in transmitter sites made by such stations after said date, separations smaller than the required minimum are increased but still remain lower than the required minimum, protection accorded such stations will be limited to the new separations.

9. Section 73.3516 is amended by revising paragraph (a) to read as follows:

§73.3516 Specification of facilities.

(a) An application for facilities in the AM, FM, or TV broadcast services or low power TV service shall be limited to one frequency, or channel, and no application will be accepted for filing if it requests an alternate frequency or channel.

* * * * *

10. Section 73.3572 is amended by revising paragraphs (a)(1), (a)(1)(i) and (d) to read as follows:

§73.3572 Processing of TV broadcast, low power TV and TV translator station applications.

(a) * * *

(1) In the first group are applications for new stations or major changes in the facilities of authorized stations. A major change for TV broadcast stations authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (§73.606). Other requests for change in frequency or community of license for TV stations must first by submitted in the form of a petition for rulemaking to amend the Table of Allotment. In the case of low power TV and TV translator stations authorized under Part 74 of this Chapter, a major change is any change in: (i) Frequency (output channel);

* * * * *

(d) Except for applications for low power TV and TV translator stations, regardless of the number of applications filed for channels in a city or the number of allotments available in that city, those applications which are mutually exclusive, *i.e.*, which request the same channel, will be designated for hearing. All other applications for channels will, if the applicants are duly qualified, receive grants. For example, if channels 6, 13, 47 and 53 have been assigned to City X and there are pending two applications for Channel 6 and one application for each of the remaining channels, the latter three applications will be considered grants without hearing and the two mutually exclusive applications requesting Channel 6 will be designated for hearing. If there are two pending applications for Channel 6 and two applications for Channel 13, separate hearings will be held.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 86-444

KDUN RADIO, INC.	File No. BP-820305AV
KDUN, Reedsport, Oregon	
Has: 1470 kHz, 5 kW, D	
Req: 1030 kHz, 0.5 kW, 10 kW-LS, U	
M. KEITH ALLGOOD &	
STANLEY SOHO	File No. BP-830705AA
d/b/a CENTRAL POINT	
BROADCASTING	
Central Point, Oregon	
Req: 1020 kHz, 0.25 kW, 50 kW-LS, U	
BEARDSLEE	
BROADCASTING,INC.	File No. BP-830706AA
Philomath, Oregon	
Req: 1020 kHz, 500 W, 2.5 kW-LS, U	
LEROY W.	
DEMERY, JR.	File No. BP-830706AE
Ashland, Oregon	
Req: 990 kHz, 2.5 kW, D	

For Construction Permit

HEARING DESIGNATION ORDER

Adopted: November 7, 1986 Released: November 26, 1986

By the Chief, Audio Services Division

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the above-captioned mutually-exclusive applications. These applications are linked to each other either directly or indirectly through the presence of intervening interlocking proposals.[1] Also before us is an informal objection filed against the Leroy W. Demery, Jr. application on behalf of AM-FM broadcast station KRKT, Albany, Oregon.

2. *KDUN Radio, Inc. application.* While KDUN seeks waiver of Section 73.24(j) of our rules, its application indicates substantial compliance, in that more than 80% of the area is covered. Therefore, no waiver is necessary.

3. *Central Point Broadcasting application.* The engineering portion of the Central Point application is missing site photos, which must be submitted in an amendment filed with the presiding Administrative Law Judge within thirty (30) days of the release of this Order.

4. The Mass Media Bureau has cancelled, for failure to construct, permits for AM broadcast stations KPUB, Winters, Texas and KGUS, Florence, Arizona, both granted to Stanley Soho, one of the two general partners of Central Point Broadcasting. Mr. Soho informed the Bureau, in connection with these permits, that he and his wife were suffering from various illnesses and were having difficulty carrying out their day-to-day management tasks and would thus seek assignment. As the Central Point application does not specify a particular role for Stanley Soho, we cannot assess the impact of these cancellations on the ability or intent to construct and operate as proposed. At the same time, given Mr. Soho's recent history, we require Central Point Broadcasting to file an amendment assuring the Commission that it is capable of and does intend to build. Said amendment should be filed with the presiding Administrative Law Judge within thirty (30) days of the release of this Order.

5. *Beardslee Broadcasting, Inc. application.* The engineering portion of the Beardslee application is missing site photos and fails to specify the type of excitation for its antenna system. These deficiencies must be corrected by amendments filed with the presiding Administrative Law Judge within thirty (30) days of the release of this Order.

6. *Leroy W. Demery, Jr. application.* An informal objection was filed by Bill O'Brian, Operations Manager, on behalf of broadcast station KRKT, Albany, Oregon. O'Brian alleged that a grant of the Demery proposal could possibly have a detrimental effect on KRKT's future plans to increase power. KRKT's informal objection is hereby denied, as unspecified future plans are not considered a basis for rejecting an acceptable proposal.

7. The engineering portion of the Demery application is missing site photos which must be submitted in an amendment filed with the presiding Administrative Law Judge within thirty (30) days of the release of this Order.

8. Except as indicated by the issues specified below, all applicants are qualified to construct and operate as proposed.[2] However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding. As the proposals are for different communities, we will specify an issue to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal (or combination of proposals) would best provide a fair, efficient, and equitable distribution of radio service. We will also specify a contingent comparative issue, should such an evaluation of the proposals prove warranted.

9. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the areas and populations which would gain or lose primary aural service from the proposal of KDUN Radio, Inc. and the availability of other primary service to such areas and populations, (b) the areas and populations which would receive primary aural service from the remaining proposals and the availability of other primary service to such areas and populations, and (c) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals (or combination of proposals) would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

10. IT IS FURTHER ORDERED, That Central Point Broadcasting file an amendment to correct the engineering deficiency specified in paragraph 3 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That Central Point Broadcasting file an amendment regarding it capacity to build, as discussed in paragraph 4, with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That Beardslee Broadcasting, Inc. file an amendment to correct the engineerng deficiencies specified in paragraph 5 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That the informal objection filed by broadcast station KRKT IS DENIED.

14. IT IS FURTHER ORDERED, That Leroy W. Demery, Jr. file an amendment to correct the engineering deficiency specified in paragraph 7 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W. Washington, D.C.

16. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicants shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Groups of this nature are commonly termed "daisy chains."

[2] Operation with the facilities specified herein is subject to modification, suspension or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Final Acts of the ITU Administratve Conference on Medium Frequency Broadcasting in Region 2 Rio de Janeiro 1981 and to bilateral and other multilateral agreements between the United States and other countries.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-438

Gingrich
Broadcasting
Company, Ltd. File No. BPH-830207AD
(hereafter "GBC")
Port Huron, Michigan
Req: 102.3 MHz, Channel 272A
1.10 kW (H & V), 152 meters

Port Huron
Family Radio, Inc. File No. BPH-830325AE
(hereafter "Family")
Port Huron, Michigan
Req: 102.3MHz, Channel 272A
3 kW (H & V), 91 meters

Nereida Rivera and
Brenda S. Whitley File No. BPH-830713AD
d/b/a Port City Radio, Ltd.
(hereafter "Radio")
Port Huron, Michigan
Req: 102.3 MHz, Channel 272A
3 kW (H & V), 91 meters

L & K
Broadcasting, Inc. File No. BPH-830714AC
(hereafter "L & K")
Port Huron, Michigan
Req: 102.3 MHz, Channel 272A
2.6 kW (H & V), 100 meters

Enterform, Inc. File No. BPH-830714AD
(hereafter "Enterform")
Port Huron, Michigan
Req: 102.3 MHz, Channel 272A
1.2 kW (H & V), 135 meters

Thomas J.
Sommerville et al., File No. BPH-830714AW
d/b/a Port Huron FM Broadcasting Company
(hereafter "Port")
Port Huron, Michigan
Req: 102.3 MHz, Channel 272A
3 kW (H & V), 91 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: November 5, 1986 Released: November 26, 1986

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

Applicable	Inapplicable
[X]	[ ]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

GBC

City Coverage Waiver

Applicable	Inapplicable
[X]	[ ]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:

APPLICANT(S)	WAIVER JUSTIFICATION(S)
GBC	See Appendix
Family	See Appendix
Radio	See Appendix

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified: GBC, Family, Radio

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT(S)	DEFICIENCY

Applicable	Inapplicable
[ ]	[X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

APPLICANT(S):

Programming Statement

Applicable	Inapplicable
[ ]	[X]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

E.E.O.

Applicable	Inapplicable
[ ]	[X]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cut-off date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT(S)	DATE AMENDMENT(S) FILED
Port	5/29/84; 1/7/86; 1/31/86; 4/24/86
Enterform	10/10/86

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[ ]	[X]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S):

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[ ]	[X]

. To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

City Coverage

Applicable	Inapplicable
[X]	[ ]

2. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

GBC, Family, Radio

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

. To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Air Hazard

Applicable	Inapplicable
[ ]	[X]

. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation:

307(b)

Applicable	Inapplicable
[ ]	[X]

. To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

Comparative

Applicable	Inapplicable
[X]	[ ]

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Local Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[X]	[ ]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

GBC

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[ ]	[X]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

E.E.O.

Applicable	Inapplicable
[ ]	[X]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein:

Port, Enterform

Air Hazard

Applicable	Inapplicable
[ ]	[X]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20054.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX(ES)
[X] IS [ ] IS NOT
ATTACHED

APPENDIX

Additional Opinion Paragraphs

31. *GBC*. Review of the GBC engineering proposal reveals that GBC's HAAT figures in FCC Form 301, Section V-B Item 6 ("500") and Item 15, ("630") are inconsistent. Furthermore, Section V-B, Item 15 data indicates that the distances to the 3.16 mV/m and 1.0 mV/m contours are inaccurate by as much as 7.5%. Consequently, it is not possible to accurately plot the coverage area of GBC's proposal, nor to determine if GBC's proposal provides for a 70 dBu signal or better over the principal community of license as set forth in 47 C.F.R. § 73.315. Accordingly, the applicant will be required to file an appropriate amendment remedying these deficiencies with the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, a city coverage issue will be specified.

32. *Family*. On January 9, 1984, Port filed an informal objection to Family's application, claiming that "the [Family] station as proposed would not provide the required grade of service to an area of 0.75 square miles within the city limits of Port Huron. The application thus fails to show compliance with Section 73.315(a)." In its February 23, 1984 reply, Family concedes that "[t]he land area not served is 0.18 square miles" and that "the percentage of Port Huron included within the 70 dBu contour is 98.2%." Accordingly, Family has requested a waiver of 47 C.F.R. § 73.315. However, the maps provided with the application and with Family's reply to Port's objection are insufficient to verify Family's claims, in that the percentage of land area not covered by the requisite 70 dBu signal cannot be determined. (In addition, Family has failed to provide information relative to the population of Port Huron not served by its proposed 70 dBu contour.) Accordingly, an issue has been specified.

33. *Radio*. On January 9, 1984 Port filed an informal objection to Radio's application, claiming that "the Port City [Radio] station as proposed would not provide the required grade of service to an area of 0.25 square miles (seven city blocks) within the city limits of Port Huron. The application thus fails to show compliance with Section 73.315(a)." Radio has neither responded to Port's objection nor requested a waiver of 47 C.F.R. § 73.315(a).

The maps provided with Radio's application are insufficient to verify compliance with this rule. Accordingly, an issue has been specified.

34. *L & K.* On January 6, 1984, before the "B" cut-off date for minor amendments as of right,[2] L & K filed an amendment to (i) reflect a change in its ownership, (ii) have auxiliary power at both its main studio and transmitter, and (iii) to increase its ERP from 2.7 kW to 3.0 kW while maintaining its original HAAT, 100 meters, in accordance with the new maximum facilities proposed for Class A stations in the *Report and Order* in BC Docket 80-90, 94 FCC 2d 152 (1983). With respect to (iii) above, L & K stated that it would officially amend this portion of its application at the time the rules proposed in this docket were implemented. On March 1, 1984 in a *Memorandum Opinion and Order*, 95 FCC 2d 279 (1984), the Commission dealt with reconsiderations filed in BC Docket 80-90 and implemented the rules contained therein. On May 18, 1984, L & K petitioned for acceptance of the power increase portion of its January 6, 1984 amendment.

35. Since the power increase portion of L & K's amendment was filed after the "B" cut-off date, a "good cause" showing is required under 47 C.F.R. § 73.3522(b). The fact that a rule change has afforded an opportunity to increase power is not, standing alone, sufficient good cause to warrant acceptance of the amendment. We note that, unlike the rule change with regard to Class C facilities, the rule change for Class A stations merely *permits* the increase, not requires it. Accordingly, the May 18, 1984 petition will be denied and the portion of the January 6, 1984 amendment dealing with the proposed power increase will not be accepted.

36. On November 26, 1985, L & K filed an amendment to change transmitter site[3] because "the site originally specified by the applicant was specified without obtaining reasonable assurance as that concept is now defined by the Commission. While the site was available for sale at the time the L & K application was filed, L & K's principals did not obtain any formal assurance from the land owner that the site could be specified as a proposed transmitter site in an FCC application." L & K has submitted the November 26, 1985 new transmitter site amendment as an attempt to resolve all questions of reasonable assurance of site availability. L & K contends that good cause exists for acceptance of the amendment as it would be in the public interest to provide the Commission with a greater choice among applicants. However, in the amendment, L & K also has specified the new maximum facilities for Class A stations by upgrading from 2.62 kW, 327 ft. to 3 kW, 100 meters. Port has filed an informal objection to this amendment and Radio has filed comments, to which L & K has filed a reply. L & K, having admitted that the site specified in its initial application was never "reasonably available" to it, has thus failed to provide a good cause showing as required under 47 C.F.R. § 73.3522(b) for accepting this amendment long after the "B" cut-off date.

> "While it is desirable to have as many qualified applicants as possible from which to select a broadcast licensee, [w]e have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n. 7 (1985).

The amendment is therefore not acceptable for filing and will be returned. Furthermore, a site availability issue will be specified.

37. L & K indicates the station will employ 5 or more full-time employees, and has provided a model equal employment opportunity (EEO) program, but has failed to disclose the name of the person responsible for implementation of the EEO program. Accordingly, L & K will be required to provide the presiding Administrative Law Judge with the required information by amendment within 30 days from the release of this Order.

38. *Other Matters.* Engineering analysis indicates that applicants GBC, Family and Radio improperly determined the height above averge terrain by the exclusion of certain radials that lie substantially over water. 47 C.F.R. § 73.313 requires that such radials be included where U.S. territory lies beyond 2 miles from the transmitter site. The instant case requires that the height of the radial be determined for that distance between 2 miles and the water's edge, and that this value be used to properly determine the height above average terrain and other parameters. Engineering amendments demonstrating compliance with this rule must be submitted by the above mentioned parties and must include the radials specified:

GBC 0 degrees
Family 135 degrees
Radio 90 degrees, 135 degrees

In addition, a city coverage issue has been specified, (see paragraph 7 and issue #2) as coverage may be altered by these amendments.

39. GBC derated its effective radiated power improperly through failure to comply with the special derating curve provided in Figure 1 of the Canadian-USA Working Arrangement of 1964. This derating was required at the time of filing of all of the applications in this proceeding, which were received and cut off prior to the effective date, November 1984, of the current Canadian-USA Working Arrangement. The former treaty limits were observed by all of the other applicants. Although the 1984 treaty eliminated the derating curve requirement and thus now permits greater facilities than were formerly permitted under the 1964 agreement, GBC may gain no comparative advantage from its earlier error, which had resulted in its proposal exceeding the 1964 treaty limits.

Additional Issue Paragraph

1. To determine whether L & K has reasonable assurance that the transmitter site specified will be available to it.

Additional Ordering Clauses

40. IT IS FURTHER ORDERED, That GBC shall submit to the presiding Administrative Law Judge within 30 days of the release of this Order, an amendment to its application (i) correcting the inconsistent antenna height above average terrain data - Items 6 and 15 of FCC Form 301, (ii) correcting the predicted distances to the 3.16

mV/m and 1.0 mV/m contours, and (iii) demonstrating principal community coverage pursuant to 47 C.F.R. § 73.315.

41. IT IS FURTHER ORDERED, That the informal objections filed by Port against Family and Radio ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

42. IT IS FURTHER ORDERED, That L & K's March 18, 1984 petition for acceptance IS DENIED, and the power increase portion of the January 6, 1984 amendment will be stricken and RETURNED AS UNACCEPTABLE FOR FILING in accordance with 47 C.F.R. § 73.3522.

43. IT IS FURTHER ORDERED, That L & K's November 25, 1985 amendment IS NOT ACCEPTED FOR FILING in accordance with 47 C.F.R. § 73.3522 and IS HEREWITH RETURNED.

44. IT IS FURTHER ORDERED, That L & K shall submit the appropriate amendment regarding its EEO program to the Administrative Law Judge within 30 days of the release of this Order.

45. IT IS FURTHER ORDERED, That GBC, Family and Radio shall submit the appropriate engineering amendments to the Administrative Law Judge demonstrating compliance with 47 C.F.R. § 73.313 within 30 days of the release of this Order.

46. IT IS FURTHER ORDERED, That the October 21, 1986 motion to strike filed by Family against Enterform IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

FOOTNOTES

[1] The application of M & C Broadcasting, Inc. was returned on October 6, 1983 as untimely filed. See *M & C Broadcasting, Inc.*, Mimeo No. 35777, released April 29, 1985.

[2] January 8, 1984, the date specified as the "B" date by public notice was a Sunday. Therefore, in accordance with 47 C.F.R. §§ 1.4(d) and (h)(i), the cut-off date was January 9, 1984.

[3] A copy of the letter of site certification, OMB No. 3060-0027, was filed by L & K on January 3, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-446

MARVIN G. SCHWARTZ File No. BP-840405AA
Widefield, Colorado
Req: 820 kHz, 1 kW, DA-D

VERNICE M. DUNBAR File No. BP-840508AA
Manitou Springs, Colorado
Req: 820 kHz, 1 kW, DA-D

LOUIS FOREMAN ALLEN File No. BP-840828AF
Falcon, Colorado
Req: 820 kHz, 2.5 kW, DA-D

For Construction Permit

HEARING DESIGNATION ORDER

Adopted: November 17, 1986 Released: November 26, 1986

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the mutually exclusive applications of Marvin G. Schwartz ("Schwartz"), Vernice M. Dunbar ("Dunbar") and Louis Foreman Allen ("Allen").

2. *The Schwartz application.* Section V-A, Paragraph 8 of FCC Form 301 requires applicants to file a sufficient number of photographs to permit identification of all structures in the vicinity of the antenna site. Schwartz's application does not contain the required site photographs. Also needed are corrected tabulated radiation values to correspond with applicant's daytime directional radiation pattern. Accordingly, appropriate amendments must be submitted.

3. *The Dunbar application.* Applicant must submit a corrected daytime horizontal pattern because the tabulation radiation values do not correspond with the horizontal pattern plot.

4. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding. As the proposals are for different communities, we will specify issues to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would best provide a fair, efficient and equitable distribution of radio services. We will also specify a contingent comparative issue, should such an evaluation of the proposals prove warranted.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the areas and populations which would receive primary aural service from the three proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That Marvin G. Schwartz shall file the amendments specified in paragraph two with the presiding Administrative Law Judge within 30 days after this Order is released.

7. IT IS FURTHER ORDERED, That Vernice M. Dunbar shall file the amendment specified in paragraph three with the presiding Administrative Law Judge within 30 days after this Order is released.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C.

9. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicants shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 30 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. 10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rules, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-445

Barbara Kay Turner — File No. BPH-850201MB
(hereafter Turner)
Citronelle, Albama
Req: 101.9 MHz, Channel 270A
3 kW (H&V), 100 meters

Citronelle FM Group,
Limited Partnership — File No. BPH-850703MC
(hereafter CFC)
Citronelle, Alabama
Req: 101.9 MHz, Channel 270A
3 kW (H&V), 100 meters

George M. Cockrell &
Paul James Cockrell, — File No. BPH-850711OD
d/b/a Two C Communications
(hereafter TCC)
Citronelle, Alabama
Req: 101.9 MHz, Channel 270A
3 kW (H&V), 100 meters

Citronelle Broadcasting
Company, Ltd. — File NO. BPH-850712SD
(hereafter CBC)
Citronelle, Alabama
Req: 101.9 MHz, Channel 270A
3 kW MHz (H&V), 100 meters

Lewis M. Anzek — File No. BPH-850712SE
(hereafter Anzek)
Citronelle, Alabama
Req: 101.9 MHz, Channel 270A
3 kW (H&V), 100 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: November 17, 1986 Released: November 26, 1986

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. *Anzek.* The guidelines to the Model EEO Program, Paragraph IV, Section VI, Page 4, FCC Form 301 provide that applicant specify the recruitment sources that it proposes to use in recruiting minority and female applicants. Anzek has not indicated specific recruitment sources in its EEO program. Applicant shall amend its application by submitting specific sources of recruitement to the presiding Administrative Law Judge.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Anzek shall file data relative to Paragraph IV, Section VI, Page 4 of FCC Form 301 with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20054.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-349[1]

In the Matter of

Amendment of Part 76 of the
Commission's Rules Concerning
Carriage of Television Broadcast
Signals by Cable Television Systems

REPORT AND ORDER
Proceeding Terminated

Adopted: August 7, 1986; Released: November 28, 1986

By the Commission: Commissioners Quello and Dawson issuing separate statements.

TABLE OF CONTENTS

	Paragraph
1. INTRODUCTION	1
2. BACKGROUND	2
3. SUMMARY OF THE RECORD.	30
A. Comments Concerning the Federal Interest	30
B. Comments Concerning the Need for Regulation.	36
C. Proposals.	59
4. DISCUSSION	114
A. The Federal Interest	114
B. The Need for Regulation.	121
C. Policy Decision.	135
D. Description of the New Rules	140
E. The New Rules Meet the Need for Regulation	160
F. Alternative Proposals Considered and Rejected	173
5. CONSTITUTIONAL AND STATUTORY CONSIDERATIONS	180
A. First Amendment Issues	180
B. Other Constitutional and Statutory Concerns	201
6. OTHER REGULATORY FACTORS AFFECTING TELEVISION MARKETS	212
7. PROCEDURAL MATTERS	215

INTRODUCTION

1. By this action, the Commission is adopting a two-part regulatory program that eventually will eliminate the need for cable television mandatory signal carriage regulation. The previous "must carry" rules were held constitutionally invalid by the United States Court of Appeals for the District of Columbia Circuit in *Quincy Cable TV, Inc. v. FCC* (*Quincy*).[2] The first part of the new regulatory program will require cable systems to offer subscribers input selector switches for use with antennas and to conduct a consumer education program concerning the purpose of, and need for, maintaining off-the-air reception capability.[3] The second part of this plan consists of interim must carry rules that are intended to provide an orderly transition to a new environment. Thus, the new must carry rules will expire at the end of a five year transition period. These interim must carry rules are a modified version of the proposed industry agreement that was filed jointly by several of the major broadcast and cable trade associations.[4] The modifications to the industry agreement include specific protections for noncommercial educational and new commercial broadcast stations. The new regulatory program is designed to maximize consumers' program choices by developing cable subscribers' awareness of the need for the capability to receive off-the-air broadcast signals independent of their cable service. We believe that this program provides a constitutionally acceptable balance between the need to protect this federal interest and the First Amendment rights of cable operators.

BACKGROUND

2. The Commission's former must carry requirements for cable television systems are set forth in Sections 76.57-76.61 of its rules.[5] Under these rules, a cable system was required, upon request and within the limits of its channel capacity, to carry the signals of all local broadcast television stations. In general, a station is considered local if the station or its market encompasses, or is in close proximity to, the cable system's community, or if the station's signal otherwise is "significantly viewed" by off-the-air viewers in the cable system's community. The specific provisions of the must carry rules vary depending on the size of the market in which the cable system is located.[6] In accordance with the *Quincy* decision, the Commission suspended enforcement of the must carry rules, effective July 19, 1985.[7]

3. *Development of the Rules.* Broadcast television stations and cable television systems provide services and operate in manners that in some respects are complementary and in others highly competitive. Broadcast television stations offer advertiser-supported or public-supported "free" over-the-air service to their local communities. In contrast, cable systems offer multiple video services to fee-paying subscribers through the facilities of a coaxial cable. In addition to local television stations, cable systems may carry program services from other sources such as distant television stations, special satellite-delivered cable networks and premium services, and local origination channels.

4. Because of their ability to bring additional competing program services into local television markets and their perceived potential to operate as "gatekeepers" who control the off-the-air program services available to their subscribers, cable systems were viewed early in their development as potentially harmful to local broadcast television service. The Commission was initially reluctant to assert jurisdiction over the cable industry and to regulate its activities.[8] However, in the early 1960's the Commission observed increases in the number of cable systems and undertook to begin developing a comprehensive pro-

gram for regulating the growth of the cable industry and its impact on the existing broadcast television service. The must carry rules were the cornerstone of this program.

5. The Commission first acted to require cable carriage of local television service in 1962, in *Carter Mountain Transmission Corp.*[9] In that decision, the Commission specified a requirement for carriage of a local television station as a condition for grant of a construction permit for a microwave system to feed distant signals to a rural cable system. This requirement was extended to all microwave-fed cable systems in 1965, in the *First Report and Order* in Docket Nos. 14895 and 15233.[10] A year later, in the *Second Report and Order* in Docket Nos. 14895 and 15233, the Commission applied must carry requirements to all cable systems, regardless of whether or how they imported distant signals.[11] In the 1972 *Cable Television Report and Order*, the Commission "fine-tuned" the must carry rules in accordance with the implementation of comprehensive rules for regulation of the cable industry.[12]

6. In adopting must carry requirements, the Commission held that oversight of cable television was necessary to fulfill its statutory obligations under the Communications Act of 1934, as amended.[13] In this respect, the Commission stated that the Communications Act charges it with the duty "to make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communications service" (47 U.S.C.§151) and "generally to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. §303(g)). It also stated that it is required "to make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. §307(b)). The Commission indicated that under these statutory provisions, its duty was "to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis."[14] It further explained that it sought to fulfill this responsibility through the table of television channel assignments in Section 73.603 of the rules.

7. The Commission's decision to regulate cable systems grew out of its concern that the "explosive" nationwide growth of cable service threatened to harm the existing local television service as provided under the channel assignment plan.[15] After examining the nature and operation of cable systems, the Commission determined that it could not rely on cable as a primary means to achieve its television service allocation objectives. The Commission observed that because of the prohibitive cost of extending cable service beyond built-up areas, cable systems could not serve many persons reached by broadcast signals. The Commission noted that households unable to obtain cable service, and those who cannot afford or are unwilling to pay for it, are entirely dependent on local or nearby stations for their television service.[16] The Commission also considered that local television stations afford a means for community self-expression, whereas very few cable systems originate local programming. Finally, the Commission indicated that it intended for the commercial television system to distribute programs to the public through a multiplicity of local outlets.

8. On this basis, the Commission concluded that cable was a "supplementary" service and that it was necessary to protect local broadcast television service from any adverse effects from competition with cable services, particularly the importation of distant signals. However, the Commission also recognized that cable facilities could provide significant public interest benefits by assisting in expansion of television service in underserved areas. Thus, the Commission felt that it was of the utmost importance to the public interest that extensions of television service by the auxiliary facilities of cable be accomplished in a fair and equitable manner and that cable and broadcast facilities have complementary, rather than conflicting roles.[17]

9. In developing policy to regulate cable growth, the Commission devoted substantial attention to the economic relationship between broadcast stations and cable systems and the conditions under which competitive impact occurs. The basic analysis of this relationship as relied upon by the Commission was as follows.[18] Cable systems bring to areas already served by one or more television stations the signals of other stations that are well beyond the normal range of reception. These additional signals compete with the local stations for a share of the available audience. If subscribers view distant signals to the exclusion of local stations, the audience will become fragmented and the local stations will lose viewers. As the audience a station can deliver decreases, advertisers will demand lower prices per unit of air time, and station revenues and profits will decline. Decreased revenues and profits will cause the local station to reduce its program efforts, and thereby to reduce its service to the public. Most importantly, it was assumed that in cases where a cable system did not carry a particular local station, each gain of a subscriber by the cable system would mean the full loss of a potential viewer for the station. The Commission recognized the possibility that the viewer access problem could be solved through the use of A/B switches that would permit cable subscribers to alternate as needed between an off-the-air antenna and the cable.[19] However, it rejected this as a solution on the grounds that then existing switches were ultimately inconvenient and would not be used by subscribers.

10. In view of these considerations, the Commission drew two broad conclusions with respect to cable signal carriage:

> 1) As a competitive practice, the failure or refusal by a cable system to carry the signal of a local station is inconsistent with the principle that cable should supplement, but not replace, over-the-air television service, and;
>
> 2) Because it is inconsistent with the concept of cable as a supplementary service, an unreasonable restriction on the local station's ability to compete, and patently destructive of the Commission's goals in allocating television channels to different areas and communities, a cable system's failure to carry the signal of a local station is inherently contrary to the public interest.[20]

11. The Commission stated that in light of the basic conditions under which competition occurs between cable systems and broadcast television stations, its decision to adopt must carry rules did not depend on a showing that cable competition is demonstrably certain to cause widespread and serious damage to the public interest in television service. It asserted that it would be contrary to the public interest to defer action until a serious loss of existing and potential service had occurred, or until exist-

ing service had been significantly impaired – i.e., to wait "until the bodies pile up" before conceding that a problem exists.[21]

12. Nonetheless, the Commission considered the numerous empirical studies and analyses that were available concerning the impact of cable television. It concluded that it was "impossible, from the data at hand, to isolate reliably the effects of [cable] competition from all of the other factors which operate to produce particular financial results in different settings."[22] However, it also found that the available empirical data and studies demonstrated that cable could have a substantial negative effect upon station revenues and audiences.[23] The Commission further concluded that because of cable's rapid growth, the problem was likely to be more serious in the future than it had been in the past.[24]

13. A year later the Commission extended the must carry rules to all cable systems. In its decision, the Commission stated that its analysis with respect to the need for regulatory action in the *First Report and Order* applied equally to nonmicrowave served cable systems.[25] It noted that the economic studies considered in its initial adoption of mandatory signal carriage requirements concerned microwave as well as nonmicrowave cable systems. The Commission declined to conduct a further fact-finding inquiry on nonmicrowave cable systems because such studies were proving to be out-of-date almost before there was time to consider them.

14. The Commission has not readdressed the basic rationale or underlying predicates for the must carry rules in the time since their initial adoption. The rules currently suspended are essentially the version that was adopted in the 1972 *Cable Television Report and Order*.

15. Over the years, the cable industry has continued to grow and develop. Cable systems are no longer simply auxiliary facilities for retransmitting the signals of broadcast television stations. Rather, they have evolved as providers of a multiplicity of video services from a broad range of program sources, some of which are original to cable. These changes have not gone unnoticed by the Commission. In the *Economic Inquiry Report*, the Commission recognized that the growth of cable and other program delivery systems such as videocassette recorders (VCRs) was changing the video services market and that cable in particular was no longer an auxiliary or secondary distribution service.[26] The Commission observed that video services were being provided by a more diverse set of media and that this trend was likely to grow and develop to a greater extent in the future. The Commission further stated that it has become clear that the supply of home entertainment and information services could be increased through this greater variety of delivery alternatives. It concluded that with the advent of these new services, the justifications for attempting to control cable had declined accordingly.[27] This change in the nature of cable and the video industry resulted in the Commission's decision to eliminate most of the rules other than must carry that were adopted as part of the comprehensive cable regulatory plan.[28]

16. Moreover, Congress recognized the emergence of the cable industry as a major participant in the market for television services in the Cable Communications Policy Act of 1984 (Cable Act).[29] This legislation, which was signed into law on October 30, 1984, amended the Communications Act by adding a new Title VI, entitled "Cable Communications."[30] The intent of the Cable Act is to establish a national policy that encourages the growth and development of cable television services and assures that cable systems are responsive to the needs and interests of the local communities they serve.

17. *The Quincy Decision*. On July 19, 1985, the United States Court of Appeals for the District of Columbia Circuit ruled in the *Quincy* case that the Commission's must carry rules were unconstitutional.[31] In *Quincy*, the court considered whether the must carry rules violate the First Amendment rights of cable operators, cable programmers and the viewing public. It found that the rules unconstitutionally infringe upon cable operators' rights to freely exercise editorial discretion in selecting the content of program services provided by their cable systems.[32] It further found that the must carry rules could also affect the First Amendment rights of cable programmers and subscribers. In this respect, it indicated that if a cable system's channel capacity is substantially or completely occupied by mandatory carriage signals, cable programmers may be prevented from reaching their intended audiences and subscribers' viewing preferences may be disregarded.[33]

18. The court used a two step procedure to determine the appropriate standard of review for assessing the constitutionality of the must carry rules. It first evaluated the propriety of applying the lenient First Amendment standard traditionally utilized in assessing the constitutionality of broadcast regulation.[34] Cognizant of the "[S]upreme Court's repeated admonitions to be sensitive to the unique features of each medium of expression,"[35] the court determined that the "scarcity rationale" sustaining much of the regulation of broadcasting "has no place in evaluating government regulation of cable television."[36] The court was unable to discern any attributes of cable that would justify use of the standard traditionally applied to the broadcast media, and concluded that it "must look elsewhere to determine the appropriate yardstick against which to measure the constitutionality of the must-carry rules."[37]

19. The court next considered, but did not decide, whether to apply the balancing test established for "incidental" burdens on speech set forth in *United States v. O'Brien* (*O'Brien*),[38] or the more stringent standard for content-based regulations enunciated in *Miami Herald Publishing Co. v. Tornillo* (*Miami Herald*).[39] It examined the purposes underlying the must carry rules and the nature and degree of the intrusions they effect, and was unable to conclude that they burden First Amendment rights only incidentally. In this regard, the court determined that the must carry rules favor one group of speakers, broadcasters, over another, cable programmers; they coerce speech by significantly compromising cable operators' otherwise broad editorial discretion; and, where channel capacity is at least substantially occupied by mandatory signals, they are a barrier between cable programmers and their audience and may cause viewers' preferences to be disregarded. In light of these intrusions on rights and activities protected by the First Amendment, the court had "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech."[40]

20. However, assuming for purposes of analysis that the rules impose only an incidental burden, the court concluded that, as written, the must carry regulations are "clearly impermissible" under the *O' Brien* standard.[41] It did not hold that mandatory carriage regulations are

constitutionally infirm *per se*, or that the *O'Brien* formula is the appropriate standard for reviewing the constitutionality of cable regulations generally, or must carry regulations specifically. To the contrary, the court explicitly stated that since the rules are unconstitutional under the incidental burdens formula it did not need to "definitively decide" whether a "more exacting" standard is the correct test, and left unresolved whether any form of mandatory carriage requirement could comply with the strictures of the First Amendment.[42]

21. The court stated that under an *O'Brien* analysis, a content-neutral regulation "will be sustained if it furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[43] In applying the first part of the *O'Brien* test, the court assumed that the preservation of free, locally-oriented television is an important regulatory goal. It stated, however, that "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms,"[44] and determined that the Commission had not met its heavy burden of demonstrating that the must carry regulations would vindicate the articulated governmental interest.

22. Part two of the *O'Brien* standard as applied by the *Quincy* court balances the governmental interest articulated in part one against the degree of intrusion on protected First Amendment activity caused by the regulation. According to the court, in order to pass constitutional muster, the regulation must be the least restrictive means for protecting a valid federal interest, that is, the restriction on First Amendment rights may be no greater than essential to the furtherance of the governmental interest.[45]

23. As part of its determination as to the constitutional sufficiency of the fit between the federal interest in preserving free local television service and the must carry rules, the court emphasized that the distinction between protecting local broadcasting and local broadcasters is critical. It stated that the rules are intended to protect local broadcasting, but, as written, they are overinclusive and indiscriminately protect every broadcaster. In this regard, the court stated that the rules do not take into consideration whether or to what degree the affected cable system poses a threat to the local broadcast station's economic well-being, the quantity of local service available in the cable community, or the number of local outlets already carried by the cable operator.[46]

24. In closing, the court stated that it did not find it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.[47] The court also stated that "[s]hould the Commission wish to recraft the rules in a manner that is more sensitive to the First Amendment concerns . . . it is, of course, free to do so."[48]

25. *The Notice of Proposed Rule Making.* Subsequent to the *Quincy* decision, the Commission received Petitions for Rule Making from the Association of Independent Television Stations, the National Association of Broadcasters, *et al.*, and the Corporation for Public Broadcasters, *et al.* (CPB), concerning cable carriage of broadcast television signals.[49] These petitions asked the Commission to adopt new must carry rules that would meet the constitutional concerns raised by the court.

26. In response to these petitions, the Commission adopted a combined *Notice of Inquiry and Notice of Proposed Rule Making* (*Notice*) on November 14, 1985, 50 FR 48232, to consider the matter of signal carriage rules for cable systems. Eighty-five parties filed comments and twenty-eight parties filed replies in response to the *Notice*.[50] In addition, many members of Congress submitted letters concerning this matter and many other parties filed informal comments.

27. On March 21, 1986, several of the major broadcast and cable industry associations submitted an "industry agreement" to the Commission for consideration as a plan for new must carry rules.[51] In response to the filing of the industry agreement, the Commission issued an *Order* on March 25, 1986, 51 FR 11073, requesting additional comment on the must carry matter and the industry proposals in particular. Sixty-four parties filed formal comments addressing the industry agreement.[52]

28. *Overview of the Decision.* In the time since the *Quincy* decision, the Commission has been without a comprehensive system of rules for regulating cable subscribers' access to broadcast signals. We recognize that this situation has been the subject of considerable concern on the part of broadcast interests and, more recently, many members of Congress and their staffs.[53] In this respect, it has been expressed that there is need for new must carry rules and that we should act expeditiously to complete this proceeding. In view of these concerns, we believe it is appropriate and desirable that we not delay our decision in this matter.

29. In considering the matter of signal carriage regulation for cable television systems, we will begin with an examination of the federal interests that may be affected by issues pertaining to cable carriage of broadcast stations. We next will examine the need for regulation to protect our federal interests. In this context, we will consider the various proposals for addressing the need for regulation and then will discuss our decision to adopt a two part regulatory program that will eventually eliminate the need for cable mandatory signal carriage regulation.

SUMMARY OF THE RECORD

Comments Concerning the Federal Interest

30. Broadcast interests argue that the Commission's fundamental statutory obligation to promote the widest possible dissemination of local television service will be jeopardized if cable television systems are not subject to some form of mandatory carriage requirements. In particular, broadcasters cite the Commission's adoption of the TV Table of Allotments which is designed to assure that as many communities as possible have the opportunity for at least one station. They remind the Commission that under its localism policy, broadcasters have a responsibility to provide public service programming that is responsive to the needs and issues in their local communities. Broadcasters generally submit that although recent deregulation decisions have allowed licensees more flexibility as to how these requirements are met, the basic statutory obligations underlying them have not changed. In this respect, NAB quotes the Commission's statement in the *Report and Order* in the TV deregulation proceeding that each commercial television station continues to be "subject to an obligation to provide programming that is responsive to the issues confronting its community."[54]

31. Broadcasters view must carry rules as a means by which the Commission acted to preserve and to foster the localism concept and its associated local public service objectives. According to the NAB, in the early days of the cable industry, the Commission recognized the potential of cable systems to interfere with its television allocations scheme, and to advance or hinder the implementation of its localism policy. NAB submits that the Commission recognized the technical capability of cable systems to provide service to areas that had no off-the-air reception due to terrain problems and the fact that cable would be available only to those willing or able to pay for it. It states that the Commission asserted jurisdiction over cable to preserve and continue the growth of the local television system. The United States Catholic Conference (Catholic Conference) also points out that Congress assumed the continued existence of the must carry rules and reaffirmed the principle that local communities should be able to receive locally-oriented broadcast programming when it enacted the Cable Act. Finally, numerous broadcasting interests comment that the *Quincy* decision in no way altered the Commission's statutory obligation to establish, foster, and maintain a locally-oriented broadcast system.

32. Senator John C. Danforth, in a letter to the Commission dated July 22, 1986, submits that cable's ability to perform gatekeeper functions conflicts with three long-standing substantial government interests. He states that these interests are the public's First Amendment right of access to diverse sources of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote a nationwide broadcasting service built upon local outlets.

33. Most commenters opposed to new must carry rules do not dispute the government's interest in localism, although some point out that the *Quincy* court assumed, without deciding, that the goal of encouraging localism qualifies as important or substantial under the standard enunciated in *United States v. O' Brien* (*O'Brien*).[55] However, parties representing cable interests argue that the factors underlying the federal interest in must carry regulation have changed and that to continue policies that further localism through signal carriage regulation will not necessarily further the public interest. In statements generally representative of these parties, NCTA argues that the Commission's responsibility under the Communications Act is not simply to foster localism, but rather is to promote the efficient distribution of service. It, therefore, submits that the Commission should base its decision in the must carry matter on the impact of that action on the development of a television system that maximizes access to the marketplace of ideas. NCTA asserts that must carry regulation is not warranted under this standard. In arguing this point, NCTA contends that the nature of cable television has changed significantly in recent years. It states that virtually all cable systems now offer their subscribers a multitude of video programming options in addition to retransmitting broadcast signals and that as a result, cable television is no longer regarded as merely ancillary to broadcasting. On this basis, NCTA states that cable provides an independent voice and that this has been recognized by the court in *Quincy*. It further submits that in the Cable Act, Congress recognized the importance of the cable industry as a participant in the national communications system.

34. Several commenters submit that many cable systems now provide their own independent local programming. In particular, the Connecticut Cable TV Association (Connecticut Cable) indicates that the cable systems in its state often provide more local programming than broadcast stations. Connecticut Cable further contends that nearby out-of-state stations that have must carry status generally do not provide programming directed to the local Connecticut population it serves.

35. A number of cable parties contend that the Commission's interest in protecting local television is no longer relevant in view of its decision to eliminate the television programming guidelines in the *Report and Order* in the TV deregulation proceeding.[56] NCTA, nineteen cable operators filing joint comments (Nineteen Cable Operators), and others observe that although the Commission has not completely abandoned its policy that all broadcasters should be responsive to local needs and interests, it has eliminated virtually all of the specific programming guidelines for broadcasters on the ground that market forces, including competition from cable, provide an adequate incentive for broadcasters to meet the needs of their audiences. The Nineteen Cable Operators observe that a commercial broadcaster, exercising its good faith judgment, is now free to present no local news or public affairs programming.[57] It states that under these circumstances it seems incongruous for broadcasters to claim a federally-mandated right to displace the local programming which is being provided by cable systems. The Nineteen Cable Operators argue that the fact that local news, public affairs, or any other form of local programming is now totally discretionary with a television licensee undercuts the localism rationale for the must carry rules. Similarly, the Community Antenna Television Association (CATA) argues that the concept of localism is suspect absent a newly articulated definition of what it is, what it is intended to accomplish, and what a broadcast station must do to qualify under the new definition. Tele-Communications, Inc. (TCI) states that ensuring that the maximum diversity of information is available to the public by cable is more important than the substantiality of the government's interest in local broadcasting.

Comments Concerning the Need for Regulation

36. Commenting broadcasters generally believe that the Commission's localism policy will be threatened in the absence of must carry rules. They generally submit that they would lose audience without cable carriage and that the resulting lower revenues would pose a threat to the viability and existence of many stations. Broadcasters submit that must carry rules are needed to protect the free, over-the-air television system from this impact. The City of Boston stresses that it is important to protect local broadcast television stations because they are still the primary source of local news, public affairs, and other information programming.[58] Broadcasters also contend that the potential for harm is great now because nearly half of the nation's TV households are dependent on cable for delivery of their television service.

37. Press Broadcasting Company and several others question the value of the requirement for local stations to present issue-responsive programming if the audiences those programs are intended for will not be readily able to receive them. In this respect, Cape Video Network

contends that cable operators should shoulder part of the burden to foster localism through a requirement to carry local signals.

38. Several broadcasting interests contend that cable operators will be able to exert extensive power over the local broadcasters if they are not subject to must carry rules. Broadcasters assert that cable operators are typically monopolists within their service areas and can act as "gatekeepers," deciding which broadcast stations, if any, are carried by their systems. They argue that cable operators, by using this advantage, can prevent local stations from reaching the audiences they are licensed to serve. Tribune Broadcasting (Tribune) argues that without must carry requirements a local broadcaster's access to its service area will be subject to the whim of the cable operator, who is a competitor. Senator Danforth, in his July 22, 1986, letter states that there are two characteristics of cable that justify mandatory carriage requirements: first, that viewers may need cable service to receive local broadcast signals and; second, that most cable systems have a monopoly in their franchise area.

39. A number of broadcast interests express concern that cable operators consider local independent stations to be undesirable inputs to cable service even if the stations' signals are popular with subscribers and the cable systems have channel space available. These parties, particularly INTV, allege that this attitude arises because cable operators consider independent stations to be competitors in the local advertising market. They contend that a cable operator will desire to keep the signals of local independent stations off its cable system so that local advertisers will be induced to buy time on the cable system's own channels. Broadcasters also argue that some cable operators hope to drive the local independent stations off the air in an attempt both to raise local advertising rates and to force local advertisers to buy time on their cable systems' program services.

40. Numerous parties, representing several classes of broadcast stations, fear that their stations would not be carried by cable systems without mandatory carriage rules. These commenters principally include licensees of: 1) new UHF independents; 2) UHF network affiliates in markets where more than one station is affiliated with the same network; 3) smaller market UHF stations; 4) minority owned and operated stations; and, 5) public broadcasting stations. In general, these broadcasters claim that without cable carriage they will be unable to reach the audiences they are licensed to serve and will be competitively disadvantaged against other local broadcasters. UHF broadcasters state that they are more dependent than VHF stations on cable carriage due to the reception problems that are inherent to UHF signals. Several new stations that anticipated cable carriage when they began operation claim that they are already experiencing difficulty in obtaining cable carriage, are being carried on tiers other than basic service, or are being required to pay for cable carriage. Some of these commenters believe that cable operators have an incentive to keep new stations off the air. In this respect, they point out that cable penetration and demand for pay services are highest where there are few local stations and that cable operators now compete with broadcasters for local advertising.

41. According to the NAB, absent assured cable carriage, new stations in particular are caught in a "vicious financial vise." NAB and other commenters state that without mandatory carriage rights, new stations will not have access to cable households that represent a substantial portion of their potential audiences. They claim that this loss of audience will impair the ability of new stations to generate revenues that are needed to purchase and produce quality programming. These parties state that without such programming, new stations cannot attract the audiences that would indicate subscriber demand for their services and earn them the cable carriage afforded more established stations.

42. Minority and public broadcasters comment that noncarriage of their stations will deny their audiences access to the diverse programming they offer. Howard University, *et al.*, asserts that cable subscribers will not have the opportunity to be exposed to minority programming if minority-oriented stations are denied carriage. In its view, this would be an infringement on the First Amendment rights of minority broadcasters. Spanish International Network (SIN), *et al.*, licensees of Spanish language stations, state that a cable operator's decision not to carry one of their stations would deprive Spanish-speaking viewers of the unique ethnic-oriented programming that reflects their nondominant cultural identity and is in many cases the only programming these viewers can understand.

43. Public broadcasting commenters note that Congress and the Commission historically have established policies that encourage the development of independent, local public television stations to provide alternatives to mass appeal programming, to serve neglected and underserved audiences, and to respond to community needs. CPB and the other commenting public broadcasting interests believe that in the absence of must carry rules their stations will not be carried by cable operators, especially in areas where there is more than one such station.[59] They contend that the resulting loss of audience will lead to a loss of financial support that will weaken the public broadcasting system as a whole and thwart their mandate to provide diverse programming.

44. Sixteen parties,[60] representing UHF stations generally of the classes claiming they are at greatest risk, describe instances wherein they have been disadvantaged by the invalidation of the must carry rules. Specific situations described by these parties include requests for payment for signal carriage, refusals to carry a station's signal, and discontinuances of signal carriage. In general, these commenters believe that absent any must carry rules, they will not continue to receive the same quality cable carriage that they have had in the past and will thereby be disadvantaged in the competitive media environment.

45. Broadcasting interests argue that there is no satisfactory means of preserving localism if cable operators are not required to carry all local broadcast stations. They state that the often suggested option that cable subscribers could use an A/B switch and an antenna to obtain access to local signals that are not available on their cable systems is not a viable alternative.[61] In this respect, they state that subscribers are not likely to go to the trouble and expense necessary to receive those local signals that are not carried on cable. Broadcasters further contend that in many locations there is no acceptable over-the-air reception, especially for UHF stations, and that cable delivery is the only practical means for receiving local broadcast signals in such areas. In addition to the concerns about A/B switches reported in the comments, INTV elsewhere argues that these devices are not a solu-

tion to the must carry matter.[62] In particular, INTV adds that cable companies routinely volunteer to remove antennas from new subscribers' homes and that to deny carriage to local stations that are most competitive with cable services where cable operators sell local advertising will tend to perpetuate network domination of the television industry.

46. The NAB submitted a study, prepared under its auspices by the ELRA Group, Inc., that examined the extent to which cable subscribers can view local, off-the-air signals without benefit of cable carriage. Based on a sample of 610 cable households, this nationwide study of cable households found that: 1) very few cable subscribers currently have an outdoor antenna and an A/B switch; 2) most cable homes do not have roof top antennas connected to their cable sets; and, 3) a significant number of subscribers may not be able to have an outdoor antenna because of restrictive local regulations prohibiting antennas.[63] The ELRA study estimates that the cost to cable subscribers to obtain off-the-air reception capability could range from $458 million to $863 million. NAB states that these findings indicate that in the absence of must carry rules, cable subscribers could be forced to spend hundreds of millions of dollars on outdoor antennas, A/B switches, and switch installations and still would not have full assurance of being able to view local television signals. NAB also believes that ELRA's cost estimates are conservative and that the actual cost to cable subscribers could be as high as $1.6 billion.

47. NAB also submitted a statement describing technical problems associated with the use of A/B switches to enable viewers to switch from cable to off-the-air reception. Its analysis determines that this approach appears costly, complicated, and inconvenient to viewers. In particular, NAB concludes that: 1) an A/B switch must be connected to a properly maintained antenna to be effective; 2) installation of the switch and/or antenna may require professional help; 3) installation becomes more complicated and may require additional equipment if a VCR is involved;[64] 4) the currently available A/B switches do not have a remote control feature; 5) cable-ready television sets will not receive UHF signals off-the-air in the cable mode;[65] and, 6) some A/B switches can increase signal leakage.

48. The broadcast interests commenting on the compulsory copyright license state that it is a government intrusion into private negotiations for the use of copyrighted material. They state that the compulsory license is unfair because local television stations have always been required to bargain in the market for every television program they seek to exhibit, while cable television operators have been free to carry television broadcast programming at no charge for local retransmissions and at lower than market rates for distant signals. Furthermore, they state that since 1980, cable operators have been able to disregard the copyright exclusivity paid for by the local broadcast station purchaser of a syndicated television program by importing a distant station's transmission of the same program. They note that before *Quincy*, there was the countervailing consideration that the local station could at least be assured that its programming would be available to all television viewers in its home market, both over the air and on cable. Commenting broadcasters argue that the *Quincy* court was incorrect in determining that the must carry rules were simply a referential aid in the determination of the royalty fee and that, in fact, the must carry rules were intended, in part, to balance the benefit provided to cable systems by the compulsory license.

49. The government parties commenting on the compulsory license are in full agreement that it is an overregulatory mechanism that grossly distorts the efficient development of a truly competitive video market. The National Telecommunications and Information Administration (NTIA) states, and the Department of Justice (DOJ) concurs, that the compulsory license tends to discourage the production of additional, innovative programming. They believe that by artificially depressing the price paid by the cable industry for television broadcast signals, the compulsory licensing system encourages cable systems to retransmit more signals than they otherwise would. Thus, they argue that the compulsory license system serves to limit the realization of the full potential of cable television as a program distribution medium and as an alternative source of independently produced programming. The government parties state that the compulsory licensing scheme constitutes an irrational government-granted subsidy for one segment of the mass media industry. They further submit that compulsory licensing is manifestly unfair because it denies program producers the right to control the distribution and price of their product. Thus, they are concerned that the flow of investment into the programming industry may be affected. The Federal Trade Commission (FTC) argues that it is most likely that the government determined rates are incorrect and, thus, the rate-setting and royalty distribution mechanisms of the compulsory license may have led to a tendency toward reduction in the variety of programming available to consumers.

50. The government parties also agree that there appear to be few, if any, public interest benefits accruing from the compulsory license. The government parties state that a free market environment would not mean the end of the distant signal carriage market. They note that a number of satellite program distributors have come into existence in the unregulated market and act as intermediaries between copyright holders and cable operators. The government parties state that cable operators do not deal with the copyright holders of each program appearing on the satellite service, but rather deal with the program distributor who serves as an intermediary. Thus, they believe that an unregulated market in distant signal programming would quickly spawn the development of private institutions to broker the sale of distant signal programming to cable operators.

51. Finally, NTIA agrees with the broadcast parties that the vacated must carry rules and the compulsory license statute are necessarily linked together. They state that "[w]ith the court's elimination of the FCC's 'must carry' rules, the right of zero-cost access previously enjoyed by local broadcasters to local cable systems dissipates." NTIA argues that if cable systems are now to enjoy the right to pick and choose among local broadcast signals, any rationale for granting the cable industry, in effect, an exemption from the ordinary workings of the copyright laws also is vitiated.

52. Cable interests generally refute the contention that signal carriage regulation is necessary to preserve the Commission's localism policy. Cable commenters contend that even if it is determined that broadcast programming deserves special treatment because of its local nature, there is no evidence that audiences will be deprived of

access to broadcast stations in the absence of mandatory carriage rules. In statements representative of these interests, NCTA states that cable operators have an economic incentive to provide locally-oriented programming because they operate in a highly competitive market and can ill afford to be insensitive to the requirements of their subscribers. NCTA observes that according to recent audience surveys, local broadcast signals still attract a major share of cable audiences.[66] It argues that cable operators, therefore, have an economic incentive to continue to carry these local broadcast signals because they are popular with subscribers. Cable parties claim that the loss of guaranteed cable carriage is likely to have only a slight effect on local broadcasters. They contend that if the service broadcasters provide is truly local and desired by cable subscribers, then viewers who wish to receive that service will be able to do so by using off-the-air reception capability. The National Telephone Cooperative Association comments that the must carry rules tended to protect local broadcasters and not local broadcasting.

53. Cable interests generally argue that there is no evidence of need for regulation to protect local broadcasting. The cable and citizens' groups submitting comments opposing new must carry rules state that the performance of the cable industry post- *Quincy* provides convincing evidence that cable companies generally have not dropped the local broadcast signals that they had been carrying before the *Quincy* decision. They point out that there are no "dead bodies" on the landscape. These commenters also state that most broadcast stations will continue to be carried in the future because cable must satisfy subscriber preferences, which include broadcast television.

54. The staff of the FTC submitted an empirical study which indicates that, absent must carry rules, cable systems can be expected to carry many or most local broadcast stations. The FTC study evaluates the local broadcast signals carried by satellite master antenna television (SMATV) systems. SMATVs differ from conventional cable systems only in that they tend to serve buildings with multiple dwelling units and are not subject to the must carry rules. Thus, the FTC staff believes that an analysis of the behavior of SMATVs with respect to local broadcast signals should provide the Commission with a strong indication of the likely behavior of cable systems in the absence of must carry regulations. Their study of 24 SMATV systems reveals that carriage of local stations appears to be profitable and that local stations occupy on average almost half of the available channels on the systems. The FTC staff also examines how the proportion of local stations carried by SMATVs varies with the number of local broadcast stations and the number of available satellite programming services. This analysis indicates that: 1) an increase in the number of local stations is associated with an increase in the number of local stations carried by a SMATV, but the increase in local stations carried is lower than the increase in local stations – i.e., not all additional local stations are carried; and, 2) an increase in the availability of satellite services tends to reduce carriage of local stations. Based on this study, the FTC staff predicts that, absent a must carry rule, more than half of the local broadcast stations will be carried on cable systems and, in most cases, the proportion could be expected to exceed one-half by a large margin.

55. DOJ also does not believe that must carry rules are necessary to preserve and foster localism. In DOJ's view, the Commission cannot justify a need for must carry rules to further localism without demonstrating that the competitive marketplace will not ensure a desirable level of local television service. DOJ further states that the Commission has never maintained that the protection of all local broadcasters is necessary to foster the goal of a national broadcasting system. It submits that the possibility that some marginal individual broadcast stations may not survive without mandatory carriage rules is not a sufficient reason to reimpose such rules to preserve localism. DOJ further states that under *Quincy* the Commission may not reimpose must carry rules without first defining, in objective terms, the minimum amount of local broadcasting necessary to serve the public interest, and then demonstrating that absent regulation, local broadcasting would be reduced below that minimum.

56. Parties representing cable interests generally contend that the adoption of new must carry rules would limit rather than promote program diversity. In this respect, the Nineteen Cable Operators state that must carry rules displace cable programmers' only means to reach their audience, in favor of television broadcasters who have an alternative delivery mechanism to reach the public. They also submit that mandatory carriage rules do not prevent unfair competition because cable carriage alters the over-the-air competitive situation between broadcasters in a given market. Cable operators argue that must carry rules give broadcasters an unfair advantage over cable programmers who are not provided a similar guaranteed means of reaching their audience. Finally, Nineteen Cable Operators state that must carry regulations unfairly hamper cable operators who must compete with alternative video entertainment delivery systems which have no similar mandatory carriage requirements.

57. Several operators of cable programming services state that any must carry rules will preclude them from providing valuable and unique non-broadcast programming to their subscribers. TBS, the Eternal Word Television Network (EWTN), and others contend that cable channel capacity is generally limited, and that must carry requirements further limit the number of channels available for cable programming services.[67] EWTN contends that the proliferation of new UHF stations burdens cable systems and forecloses entry for new cable networks. Tele-Communications, Inc. (TCI) asserts that mandatory carriage rules impede the Cable Act's stated purpose of ensuring diversity on cable.

58. Proponents of the compulsory license contend that a "free market" in the distribution of distant signal programming would ensure the virtual elimination of a distant signal market. This argument is based upon the assumption that the costs to cable operators of negotiating, monitoring, and enforcing contracts with each and every program producer regarding each and every program exhibited on a distant signal would be prohibitively high. Cable operators claim that by eliminating the need for costly individual contracts, the compulsory license statute renders the existence of a distant signal market possible. NCTA, in its comments on the compulsory license, states that Congress did not see any connection between the compulsory license and mandatory local carriage. NCTA further states that the compulsory license reflects its agreement with the Motion Picture Association of America (MPAA), in which broadcasters played no part of record.

Proposals

59. In the *Notice*, we requested comment on the proposals filed by INTV and the public broadcasters and the concerns raised by the NAB. Interested parties were also invited to submit other specific proposals that would meet the constitutional concerns raised by the court in *Quincy*. In addition, we requested comment on the impact of these issues on the compulsory licensing scheme and our authority in this area. In the subsequent *Order*, we invited comment on the industry agreement and the more general question of whether local broadcast service and the concept of localism as a communications policy are sufficiently important to warrant an intrusion on cable operators' First Amendment rights.

60. *The INTV Permissible Signal Carriage Rule Proposal.* In the *Notice* we indicated our intention to examine the communications policy implications of cable's compulsory copyright license in light of the *Quincy* decision. In this regard, we requested comments on the permissible signal carriage rule proposed by INTV. Under this proposal, the cable operator would choose either to invoke the compulsory copyright license by carrying all signals considered "local" under the rule, or to negotiate separately with copyright holders for use of their work. The proposed rule is based on Section 111 of the Copyright Revision Act of 1976 (Copyright Act).[68] It provides:

Cable television carriage of television broadcast signals is permissible, for purposes of Section 111 (c) of the United States Code, if the cable system carries, as part of the basic tier of cable service regularly provided to all subscribers at the minimum charge, the entire signals of all local television broadcast stations without discrimination or charge. A television broadcast station is "local" as to a cable system if the cable system lies within the "local service area" of the television station, as defined in 17 U.S.C. Section 111(f).[69]

We solicited comments on the Commission's authority to adopt INTV's proposed rule and whether this proposal meets the constitutional concerns raised by the *Quincy* court.

61. Fifty-five of the commenting parties address INTV's proposal. About half of these commenters are broadcasters who support the proposal as a viable means to restore balance to the cable-copyright market. Some of these broadcasters would prefer new must carry rules, but consider this proposal an acceptable alternative. Some commenters suggest modifications to the rule proposed by INTV.

62. In its comments, INTV states that the proposed rule is a pragmatic solution to the market imbalance created by *Quincy* between cable's retransmission of broadcast television signals and the compulsory copyright license. INTV contends that the proposal is not for a must carry rule, but rather a "may carry" rule that would affect only a cable operator's method of payment for the right to retransmit broadcast television programming. It further submits that the proposed "may carry" rule is constitutional and the Commission has the authority to adopt it.

63. INTV states that the Commission's authority to adopt the proposed rule is derived from the "plain meaning" of Section 111(c)(1) of the Copyright Act, which makes cable systems eligible for compulsory licensing "where the carriage of the signals comprising the secondary transmission is permissible" under the Commission's rules. INTV states that the legislative history of the Copyright Act demonstrates an inherent and inextricable legal tie between the must carry rules and the compulsory license. INTV states that in their 1971 "Consensus Agreement," broadcasters, cable operators and program copyright owners agreed to support both local carriage rules and the compulsory licensing scheme. Many commenters supporting the proposal endorse INTV's rationale or proffer similar arguments regarding the Commission's authority. Other supporters assume the Commission's jurisdiction without discussion.

64. INTV states that its proposal is constitutional because it is a "may carry" rule that would not require or prohibit carriage of any or all television signals. Therefore, it states that the proposed rule would not infringe cable operators' First Amendment rights and, thus, would not even be subject to constitutional scrutiny. INTV also contends that it is constitutional to condition a cable operator's eligibility for compulsory licensing on its carriage of all local television signals. In this regard, INTV states that copyright is a constitutionally authorized protection, but that the compulsory license is a statutory benefit to which there is no constitutional right. INTV and some commenters argue that the proposed rule would not infringe on a cable operator's First Amendment rights and that the Commission's authority under Section 111(c)(1) of the Copyright Act includes the power to condition eligibility for the statutory benefit of the compulsory license. Overall, the proponents generally agree with INTV that the proposed rule is constitutional under *Quincy*.

65. Cable interests, DOJ, NTIA and the FTC oppose INTV's proposal. These parties state that it would effectively force cable systems to carry all local television signals and, therefore, it is a form of reimposition of the must carry rules. Similiarly, in DOJ's view "the proposal represents an effort to coax cable systems into carrying all local broadcast stations by threatening to withhold a privilege accorded by Congress." Cable interests favor maintaining the compulsory license in its current form. The FTC and NTIA state that the compulsory license should be repealed in favor of free marketplace negotiations.

66. Opposing parties also state that the Commission does not have the authority to adopt INTV's proposal. They generally concur with DOJ, which states "[w]e do not believe that the Commission may avoid the limits on its ability to determine copyright policy by defining as impermissible, for purposes of Section 111, carriage that is permissible for communications purposes." Many commenters cite *Quincy* to support the position that the compulsory license is linked only to carriage of distant signals, for which the must carry rules in effect as of April 15, 1976, were "frozen" as a definitional reference to distinguish local from distant signals.[70] These commenters claim that invalidation of the must carry rules is irrelevant for copyright purposes and that new rules affecting local signals would not affect the compulsory license.

67. Opponents generally believe that INTV's proposal is an attempt to circumvent the *O'Brien* test. They contend that this proposal, therefore, raises substantial First Amendment concerns. For example, many of the opponents state that the commercial impracticability of separate copyright negotiations will force cable operators to carry all local television signals in order to avail themselves of the compulsory license. As a result, they argue, INTV's proposal relates to program content and, thus, is subject to constitutional scrutiny. Opponents also contend

that this proposal is unconstitutional because only Congress, and not the Commission, may legitimately attach conditions to the government bestowed benefit of the compulsory license. Others argue that INTV's proposed rule would abridge cable operators' First Amendment rights by conditioning eligibility for compulsory licensing on the relinquishing of their editorial discretion.

68. *Proposals for Requiring Carriage of New Stations.* Several commenters express concern about the viability of new stations entering local television markets without the competitive equalizer of cable carriage. These parties believe that new stations which as of the *Quincy* decision either had not begun operations or captured the attention of their local television market audience or advertisers, will suffer the greatest competitive harm absent rules assuring them cable carriage. These commenters contend that unless new stations are protected, the nation's system of over-the-air broadcast television will be jeopardized. A few of these parties propose rules or suggestions designed to aid new stations. The consensus among these parties is that new stations should be carried by cable systems for a specified period of time. The time periods proposed for carriage of new stations vary from 18 months to five years.

69. Grace Cathedral, Incorporated (Grace) proposes to protect new stations using a copyright-based signal carriage rule. The proposed rule would condition availability of the compulsory license on the carriage of all "eligibile" television stations, i.e., those licensed for fewer than five years and within whose specified zone the cable system lies in whole or in part. It would require carriage of the entire signals of all eligible new stations without discrimination or charge on the cable system's basic tier of service until their period of eligibility has expired. The proposed rule would allow cable operators to elect not to use the compulsory copyright license and to "opt out" of the carriage requirements by complying with the requirements for providing written notice of the same to the Commission.

70. Grace argues that there is need for this form of regulation because cable poses an especially acute threat to new broadcast stations that have difficulty obtaining advertising revenue during their first few years of operation and cannot afford to pay for cable carriage. It asserts that the critical nature of cable access is heightened for new independents that have to compete with local network affiliates that are generally carried by cable systems.

71. In support of its proposed rule, Grace first states that it concurs with INTV's position that the Commission has authority to adopt a copyright-based signal carriage rule under Section 111(c) of the Copyright Act. Grace also asserts that its proposed rule is constitutional. In reply comments, it argues that its proposed rule is a content-neutral measure designed to promote the diversity of voices in the electronic media without unconstitutionally infringing on cable operators' First Amendment rights. In this regard, Grace contends that its proposed rule would not favor a particular point of view and would not discourage cable operators from carrying stations or from originating programming. Grace argues that its proposed rule meets the *Quincy* court's concerns respecting the overinclusiveness of local cable carriage rules. It states that the proposed rule would cure the problem under the previous must carry rules whereby protection was afforded indiscriminately to all broadcasters because it would apply only to new station licensees and only for as long as they reasonably need protection. Grace asserts that the five-year limitation would be a self-regulating device that would be responsive to local conditions since most stations have been licensed for a longer period of time. It concludes that under its rule, if a station is able to fend for itself after five years, the local market would have an additional viewpoint, and if the station fails, the rule would have functioned properly by having given the new station a chance to succeed.

72. NCTA opposes Grace's proposed rule in part on the ground that the Commission does not have the authority to affect cable's compulsory copyright license. In this regard, it argues that Section 111(c) of the Copyright Act does not authorize the Commission to impose copyright-related conditions on the permissibility of cable carriage of broadcast signals. NCTA contends that if a signal may be retransmitted pursuant to the Commission's rules with respect to communications policy, then it is subject to compulsory licensing. NCTA also asserts that Grace's proposal ignores the *Quincy* court's concerns regarding cable operators' editorial discretion, viewer preferences and interests of non-broadcast cable programmers. It states that this proposal seeks only to protect the interests of individual broadcasters without regard to the economic viability of broadcasting in the particular market.

73. *Proposals for Requiring Carriage of Public Broadcasting Stations.* In the *Notice*, we requested comment on a proposal submitted by CPB and other public broadcasting interests that the Commission adopt a rule requiring carriage, except in limited circumstances, of the entire signal of all public television stations providing Grade B service to all or part of a cable system's community. The public broadcasters' proposal would not require carriage of public television stations that simultaneously broadcast the same programming carried by another public television station. In addition, cable systems with twelve or fewer channels would not be required to carry more than three local public television stations if the systems need channel capacity to carry programming from nonlocal sources. Finally, CPB's proposal requires carriage of the entire signal transmitted by the station, including services carried on the vertical blanking interval (VBI) or on aural subcarriers.

74. In support of this proposal, CPB alleges that the loss of cable carriage would undermine the financial stability of individual public broadcasting stations as well as the entire national public television system. CPB argues that without cable carriage, local public television stations would find it more difficult, if not impossible, to reach significant portions of the audience on which they rely for support. CPB claims that virtually all public television stations are dependent for support upon viewer contributions and that such funds are the fastest growing source of public televisions' total revenues. CPB also states that viewer contributions are key to fundraising because they are subject to "matching" funds from other sources such as corporate foundations and legislative bodies. Thus, CPB asserts that without cable carriage public television station access to viewers would be restricted and viewer contributions would be reduced, thereby affecting the amount of revenue received from available "matching" funds. CPB further contends that the loss of local viewer support would jeopardize the entire public television system. In this regard, CPB points to the cooperative arrangement among public television stations for financing program production. CPB concludes that if individual public

broadcasting stations are financially weakened or forced off the air, the quality and diversity of the programming offered by the system as a whole would be adversely affected.

75. CPB also claims that this proposal complies with the First Amendment requirements established by the court in *Quincy* by stating that mandatory carriage of public television stations furthers a substantial governmental interest and is narrowly tailored to protect that interest. It states that Congress and the Commission have longstanding public interest policies regarding the fostering of a nationwide public television service built on local stations and that public television stations, especially those in the UHF band, rely on cable carriage to reach their audiences. CPB asserts that its proposal is the least restrictive means of furthering that governmental interest. It submits that this proposal would not require carriage of duplicative program services, but would foster diversity even in the relatively few situations where multiple public television stations must be carried. It states that this diversity in programming is the essence of public television's mission. CPB also claims that its proposal accommodates the First Amendment interests of cable operators by assuring that even the smallest systems have the opportunity to present programming from sources other than local public television stations. It further asserts that required carriage of VBI and aural subcarrier signals is necessary because these technologies permit public television to offer services designed to implement Congress' mandate that public television stations use their facilities to the extent feasible to generate added revenue. In its reply comments, CPB points out that with the exception of public broadcasters, none of the other commenters recognize public televisions' unique role or advance proposals that adequately protect the unique governmental interest in supporting the public television service. Thus, it argues that any of the proposals that would allow the market to determine which stations cable systems would carry are not appropriate.

76. Other commenters who support mandatory carriage of public television stations offer alternative proposals. The Catholic Conference suggests that in order to promote the important governmental interest in the public receipt of locally oriented programming, must carry rules should favor public television stations operating within the cable community. The Office of Communication, United Church of Christ, *et al*, (UCC) jointly propose mandatory carriage for at least one noncommercial station for cable systems within the top 100 markets. UCC's proposal would provide that if there is more than one noncommercial station, the one with the highest local audience would be carried. The City of New York Municipal Broadcasting System (WYNC) opposes any rule that would limit carriage of public television stations on the ground that such stations provide duplicative programming. WYNC claims that such a ground would not be based upon fact and that any resulting rule would be contrary to the public interest.

77. In opposing the CPB proposal, the Financial News Network (FNN) indicates that prior to *Quincy*, cable systems in major metropolitan areas were required to carry two or more public television stations, many of which duplicated programming of other public stations. FNN claims that the effect of the CPB proposal is nothing more than the reimposition of the former must carry rules found constitutionally invalid in *Quincy*. NCTA echoes this position and points out that, in many instances, the carriage of duplicating noncommercial stations would actually injure the noncommercial station that is most local by diverting local audience contributions. The Nineteen Cable Operators state that the CPB proposal must be rejected since it does not even address the concerns in *Quincy* that must carry rules should be sensitive to factors such as channel capacity, duplicate programming, and the preferences of cable subscribers. The Nineteen Cable Operators also contend that CPB's general allegations of financial harm are totally unsupported and that CPB has, therefore, failed to prove that its proposal is necessary to further a substantial governmental interest and that no less restrictive alternatives are available. They further argue that CPB's claims of harm to public television stations notwithstanding, other alternatives to mandatory carriage exist to protect public broadcasters such as the construction of TV translator and low-power stations, which do not infringe upon the First Amendment rights of cable operators. Accordingly, the Nineteen Cable Operators assert that CPB's proposal could not withstand constitutional scrutiny.

78. NAB would treat public television stations in the same manner as commercial stations. That is, cable systems would not be required to carry duplicate network affiliates (i.e., PBS) and the affiliate in closer proximity to the cable system would have preference. Several other commenters propose a minimum carriage rule that would require retransmission of at least one noncommercial educational station.

79. NTIA's proposal recommends that the Commission adopt a rule mandating that cable systems carry, without charge, the signals of all local nonduplicated noncommercial educational television stations, including translators. These signals would be carried in their entirety on the system's lowest priced tier. NTIA states that noncommercial stations play a unique and important role in providing instructional, educational and cultural programming generally not available on commercial stations.

80. Beyond mandating carriage for public television stations, NTIA believes that the Commission has an obligation to ensure a smooth transition from pervasive regulation to less intrusive market competition. NTIA recommends that the Commission institute a formal, continuing inquiry and fact-gathering process so that the Commission can accurately monitor and assess developments in the less regulated cable-broadcast environment. The Commission should issue interim reports of its findings on a yearly basis. At the end of three years, the Commission should make a formal determination of whether additional must carry rules are needed. In this regard, NTIA states that the Commission is not currently in the position to know whether mandatory carriage rules are needed to protect local broadcasting.

81. Finally, NTIA suggests that the Commission make clear that it would permit affected parties, including local franchising authorities, to demonstrate that a significant governmental interest would be adversely affected absent local must carry protection. It states that if such a showing is made, the Commission can adopt mandatory carriage rules tailored to that individual marketplace. NTIA further states that a case-by-case review of the need for mandated carriage in an individual television market would ensure that the public interest is protected.

82. *Input Selector Switch Proposal.* Richard S. Leghorn proposes two rules that he claims would protect viewers' capabilities to receive over-the-air television in homes that subscribe to cable.[71] The first rule would provide requirements respecting A/B switches and the second rule would establish "may carry" conditions for cable carriage of broadcast signals. Mr. Leghorn contends that these proposals would further the Commission's objectives and be less intrusive into protected First Amendment rights than any mandatory carriage rule.

83. In regard to A/B switches, Mr. Leghorn proposes requiring television set manufacturers to build input selector devices into the sets' channel control systems to permit easy selection between cable and off-the-air programming. In the absence of a manufacturer-provided switch, he would require cable operators to install A/B switches in subscriber homes at cost and would prohibit them from disconnecting UHF antennas. As a corollary to the first proposal, he suggests that cable operators be exempt from the requirement to provide A/B switches if their system carries all local unscrambled VHF signals. A signal would be "local" if its Grade B contour overlaps any part of the cable system's community unit. The second rule proposed by Mr. Leghorn would authorize cable retransmission of broadcast signals if carriage is without charge to the licensee, except for reimbursement for costs incurred by the cable system for facilities used to receive the broadcast signal or copyright fees. Additionally, he proposes to require cable systems to carry authorized signals in their entirety, without alteration or degradation and, if technically feasible, on the same channel number.

84. Mr. Leghorn contends that his proposed rules would ensure that subscribers have the opportunity to view off-the-air or cable programming. Thus, he believes that his proposal would meet the constitutional requirement that incidental governmental regulation of speech be narrowly tailored to meet the interests claimed to require that regulation.

85. NAB opposes the A/B switch proposal on the ground that such devices would not solve the problem of ensuring the availability of broadcast signals to television viewers. In this regard, it claims that in many instances off-the-air reception of broadcast signals is either nonexistent or, where existent, often cannot be received using an A/B switch without the use of substantial additional equipment that is owned by very few cable subscribers. NAB also raises several additional points to support its position that mandatory carriage rules are a solution preferable to A/B switches, including widespread local restrictions on outdoor antenna installation, receiver/switch incompatability problems, radiation interference and pre-wiring of new homes for cable.

86. *Other Proposals.* CBS Inc. proposes a rebroadcast consent rule. The rule would permit secondary transmission of local or distant television signals by cable systems only upon written consent of the originating station. However, such authority would not be necessary with respect to local signals if the cable system carries all such signals in their entirety on the station's transmission channel, without charge or alteration. CBS states that inasmuch as teletext and multichannel sound are valuable enhancements to, and form an integral part of, main channel programming, the proposed secondary transmission rule would require transmission of these signals as part of the entire broadcast signal. CBS also proposes a conjunctive rule that would allow cable systems to exclude the teletext, closed captioning and/or multichannel sound portions of the signal, if such retransmission would interfere with main channel programming, unless such interference can be remedied without a significant capital expenditure by the system. CBS asserts that the secondary transmission consent rule would promote competition and diversity in local and national markets and would effectuate the Commission's statutory responsibilities.

87. The Catholic Conference proposes a rule to protect stations which it asserts are at risk and which it believes merit carriage. This proposal would require cable systems to carry stations that meet any of the following criteria: 1) the station devotes five percent or more of its programming for local interest or is locally originated; 2) the station is a public television station whose signal covers the community served by the cable system; 3) the station is a UHF station whose signal covers the community served by the cable system; or 4) the station is an independent commercial station whose signal covers the community served by the cable system. The Catholic Conference believes that these stations should be favored because they are likely to provide programming designed to meet the needs of the local community served by them and the cable system.

88. The Catholic Conference further espouses a point system for stations by which cable systems would be obliged to fill available channels. Points would be allocated as follows: 1) one point for every five percent of total programming that is locally oriented; 2) one point for a local public television station; 3) one point for a local UHF station; or, 4) one point for a local independent commercial station. The Catholic Conference would have stations annually submit their qualification point accumulations and appropriate documentation to the cable systems upon which they request carriage. The Catholic Conference would allow the cable operator to use its business judgment to determine which station would be carried in the event two or more stations had the same point total and if the number of qualified stations exceed the number of must carry channels.

89. UCC proposes that cable systems in markets below the top 100 be required to carry all local stations, regardless of channel capacity. Under this proposal, local stations would be defined as those stations whose Grade A contour covered at least one-half the cable system's basic subscribers. UCC asserts that there are usually only a few, perhaps only one, such stations serving a cable community and that their carriage is crucial to people in the rural areas not served by the cable system. UCC believes that cable systems with limited channel capacity in the top 100 markets should be required to carry, in addition to at least one noncommercial station as discussed above: 1) any ethnic or minority-owned station serving a significant portion of the population reached by the cable system; 2) stations with more than 40 percent local programming directed to serving the needs and interests of the community; and 3) all UHF independent stations. It further argues that cable systems with larger capacity in the top 100 markets have incentive to carry all the programming they can obtain and that it is doubtful that there is any regulatory program that needs to be addressed. However, UCC states that the Commission would have full authority to intervene if problems arose with such systems.

90. Many commenters propose a geographic standard for defining "local" signals that cable systems would be required to carry. Most of these parties suggest a 50-mile zone using the city of license or transmitter location as a reference point. Other parties would require carriage of broadcast signals on all cable systems within their area of dominant influence (ADI). Some commenters propose requiring cable systems to carry any station whose Grade B contour overlaps the cable community. UCC suggests that in markets below the top 100, cable systems must carry any signal whose Grade A contour encompasses at least one-half of the cable households. Lincoln Broadcasting, licensee of KSTF, would require carriage of all foreign language stations within 50 miles. Howard University and several others would require carriage of all local minority-owned stations.

91. Most of the commenters who support some sort of must carry rules would exempt those systems with twelve or fewer channels. Some parties would extend this exemption to systems with more than 12 channels if they have less than 1500 subscribers.

92. *The Industry Agreement.* The industry agreement requires cable systems with more than twenty usable activated channels to carry all qualified local stations, in their entirety, on the lowest priced tier.[72] However, this must carry obligation is subject to stated limitations based upon the number of usable activated channels carried by the cable system. Specifically, the proposal provides that systems with 21 to 26 usable activated channels are required to carry no more than seven qualified local stations. For systems with more than 26 usable activated channels, the proposal specifies that the number of channels subject to the mandatory carriage requirement shall not exceed 25 percent of the channels of the cable system. In situations where the number of qualified local stations is greater than the prescribed cap, the cable operator is given discretion to select among the stations qualified for mandatory carriage.

93. Under the industry proposal, a qualified local station is defined as a broadcast television station that is located within 50 miles of the cable system[73] and that attracts an off-the-air audience that meets or exceeds a minimum viewing standard. To meet the viewing standard a station must receive at least a two percent share and five percent net weekly circulation in noncable homes by county.[74] Only domestically-licensed, primary, full power television stations which deliver a good quality signal to the cable system's principal headend are eligible for mandatory carry status.[75] The scope of the mandatory carriage obligation does not extend to signals contained in the vertical blanking interval. A cable system has the discretion to determine the channel position of the stations subject to mandatory carriage. In addition, it is not required to carry more than one qualified local station affiliated with the same commercial or public television network. However, the agreement specifies that if the system chooses to carry more than one station affiliated with the same network, it will not be subject to network nonduplication restrictions. In addition, a system is barred from charging for carriage for any nondistant signal that is covered by the compulsory license, whether or not that signal is subject to the mandatory carriage obligation, although a qualified broadcast station will be permitted to reimburse a cable operator for either copyright costs or the costs associated with delivering a good quality signal.[76]

94. Of the parties responding to the Commission's request for comment on the joint agreement, approximately a dozen parties, mainly representing broadcasting interests, express support for the proposal, as submitted. However, among the parties that submitted the agreement, the degree of support varies. NAB, INTV, and TOC strongly support the must carry proposal. NCTA supports the agreement, but believes that the court will have to ultimately decide its constitutionality. CATA does not believe that any must carry rules can meet the standards set forth in the *Quincy* decision. However, CATA states that if the Commission believes that rules are needed, it supports this proposal as workable and acceptable to the affected industry groups. A few commenters, such as DOJ, TBS, and American Cable Publishers Institute (ACPI), oppose any form of mandatory carriage regulation, including the industry proposal. The majority of commenters fall into one of two categories. One group would support the industry proposal if it were modified to protect selected interest groups, as they suggest in their comments. A second group opposes the industry agreement because it does not provide sufficient protection for specified interest groups. Many of the commenters from both of these groups recommend that the Commission either adopt a modified version of the industry proposal or some alternative form of must carry rules. Finally, several commenters offer opinions on selected aspects of the industry agreement without expressing either support for, or opposition to, the proposal itself.

95. In the *Order*, we requested comment on the industry agreement with emphasis on two specific issues. The first of these issues was the extent to which the parties submitting the industry agreement have been able to successfully incorporate into the agreement the specific interests of the various discrete groups involved. In particular, we indicated that we were interested in the impact of the agreement on broadcasters (noncommercial, commercial, VHF, UHF, new, established, general interest, and narrowcast stations), cable system operators, alternative users of cable channels, cable system subscribers, nonsubscribers and the public in general. Most of the commenters on this issue are broadcasters who believe that their stations will be harmed if the agreement is implemented.

96. Supporters of the industry agreement believe that it generally serves the interests of all parties by balancing the need to provide the public with free, over-the-air, local television service while preserving the maximum flexibility and discretion in cable programming for cable operators. These parties recognize that it is impossible to fully satisfy all interests, but submit that the agreement sets forth a framework for a healthy coexistence of cable and broadcast television that will result in an optimal variety of locally-oriented and other television service. They state that the industry agreement is fair to all types of broadcast stations because carriage rights are determined on a neutral, nondiscriminatory basis. These commenters further state that it protects the public interest by assuring that viewers will continue to receive local programming that is intended to meet community needs.

97. Numerous broadcasting interests assert that the industry agreement accommodates only the economic interests of established commercial broadcast licensees and cable systems. These commenters represent a substantial portion of the submissions the Commission received.

They imply that if the specified interest is harmed, the public, both cable subscribers and nonsubscribers, will be affected by the loss of some television service.

98. CPB and other public broadcasting interests, as well as numerous informal commenters, claim that the industry agreement does not recognize the substantial governmental interest in and commitment to a public broadcasting service that provides programming to a narrow audience group. In particular, the public broadcasting interests argue that the viewing standard is inappropriate and that the use of such a criterion for determining must carry eligibility would penalize local public broadcasting stations for fulfilling the very role that was envisioned for them.

99. Public broadcasters also believe that other elements of the industry proposal would dilute their carriage rights. They claim that their carriage rights would be limited by the use of a 50-mile zone. They submit that the area covered by such zones is often smaller than their Grade B service area. CPB cites A.C. Nielsen data to indicate that 68 percent of all cable systems, serving 16 percent of all cable subscribers, would be exempt from any carriage requirements because they carry 20 or less channels. Public broadcasters also claim that they are likely to be denied cable carriage in the 47 markets with eight or more television stations, and 67 percent of all television households, if the cap on the maximum number of must carry channels is retained. Again, as in earlier comments, these parties point out that duplicative public broadcasting stations do not provide duplicative service in the same manner as network affiliates. Several of these commenters further state that the failure to require carriage of noncommercial translators and satellite services will undermine many state and regional public television systems that rely on them to overcome the technical difficulties of UHF transmission and extend their service to remote areas.

100. In order to remedy these perceived infirmities with the industry agreement, public broadcasting interests present a variety of proposals that would guarantee mandatory carriage to some or all local public broadcasting stations. Among these proposals is the plan submitted by CPB in its initial comments, and supported here by the Ohio Educational Broadcasting Network, to require the carriage of all Grade B noncommercial educational stations on the basic tier. The Maryland Public Broadcasting Commission and NATPE International believe that the agreement should be modified to require carriage of at least one public television station. The Metropolitan Board of Education believes that all local public television stations should be entitled to mandatory carriage rights on all but the smallest systems. NTIA proposes the adoption of a must carry rule that mandates carriage of all nonduplicated noncommercial educational television stations, including translators, in their entirety on the lowest priced tier, but would not extend mandatory carriage to commercial stations.

101. Licensees of other types of broadcast stations that program for narrow interest groups, such as minority, specialty and religious stations, express concerns similar to those of the public broadcasters regarding their ability to attain carriage rights under the industry agreement. New stations also are concerned that they will be unable to qualify for cable carriage if the agreement is adopted. Some of these commenters argue that they will be hurt by the provisions of the industry agreement that place a cap on the maximum number of must carry signals and that exempt small systems from such requirements altogether. A number of these parties propose modifications to the industry agreement or propose their own must carry requirements to guarantee greater access for stations that appeal to smaller audiences. Among these is a proposal by the National Coalition for Minority Broadcasters (NCMB) that would require carriage of all religious, minority, specialty, and public broadcasting stations in addition to all nonduplicated commercial broadcast stations. WNJU-TV Broadcasting Corporation believes that at least one channel should be reserved for a specialty station. MPAA and several other commenters recommend that the small system exemption be lowered to include only truly saturated systems, i.e., those with 12 channels or less. The Grant Broadcasting System and several others suggest requirements for carriage of all new stations for a specified period of time ranging from two to five years similar to several of the proposals submitted in response to the *Notice*. Allen Broadcasting proposes that the cap on the maximum number of required must carry signals be raised or eliminated.

102. These interests also are concerned that the viewing standard will limit their ability to qualify for must carry rights. Several commenters propose alternatives to the proposed viewing standard. Allen Broadcasting contends that new stations should be carried from their commencement of operation until survey data for the first full television survey season are available, irrespective of the limits on must carry signals. The City of Boston proposes that the viewing standard be eliminated for public broadcasting and minority stations.

103. The industry agreement is also opposed by several network affiliates that are licensed to small markets that are near large markets. These stations believe that they will be denied carriage under the industry agreement because cable systems will prefer to carry the affiliates from the nearby larger markets. They state that the provision in the industry agreement that exempts systems from carrying duplicating network affiliates ignores the fact that affiliation with the same network does not necessarily mean that there is an excessive amount of duplicated programming. These affiliates also submit that the exemption from must carry requirements for systems with 20 or less channels disproportionately affects small market signals because a high percentage of these systems are in markets ranked below 100.

104. The second issue addressed in the *Order* was the extent to which the agreement successfully addresses the relevant constitutional concerns raised in the *Quincy* decision. Supporters of the industry agreement contend that it is constitutional under the test applied in *Quincy* and is responsive to the court's concerns. They assert that it strikes a proper balance between the First Amendment rights of broadcasters and cable operators and that it also recognizes the interests of cable subscribers and programmers. These parties state that the Commission now has a sufficient record to support the adoption of these must carry rules.

105. According to its supporters, the industry agreement is narrowly tailored to preserve cable operators' editorial discretion and also to protect the goal of localism by ensuring the availability of a modicum of local television service. They argue that this proposal does not coerce the speech of cable operators. In this respect, they point out that it allows cable operators to select the

qualified television stations they wish to carry when the number of qualified stations is greater than the number of channels set aside for must carry signals. In addition, they note that under the industry agreement, no mandatory carriage requirements are imposed on operators of small systems. They further argue that in any event, no cable system will be required to allocate more than one third of its channel capacity to must carry signals, and in most cases no more than twenty-five percent. Supporters argue that through these provisions the agreement is also responsive to the concern that cable programmers be afforded access to cable subscribers. These commenters contend that the industry proposal also gives consideration to the preferences of cable viewers since the viewership standard serves as a surrogate measure of viewer demand for a given station. Finally, they submit that by not requiring carriage of duplicative stations, channel capacity becomes available for nonbroadcast cable services desired by subscribers.

106. Many opposing commenters do not believe that the industry agreement is responsive to the court's concerns. These parties include some who argue for must carry rules, and others who oppose any mandatory carriage requirements. Many parties, especially those whose stations would not qualify for carriage if this proposal were adopted, argue that the proposed rules are not narrow enough because they protect established broadcasters, rather than those whose economic well-being is most at risk. Several of these commenters criticize the viewing standard. They argue that it discriminates against stations with the greatest public interest need for protection. Many view the proposed rules as less burdensome on cable operators' First Amendment rights than the old rules. However, they comment that the rules proposed in the industry agreement still infringe on these rights by restricting cable operators' programming decisions. These opposing commenters contend that the requirement that cable operators devote a specified number of channels to must carry signals is an intrusion on their editorial discretion because it precludes their carriage of other services. They argue that the industry agreement favors one class of speaker, broadcasters, over cable operators and cable programmers. Finally, some commenters contend that the constitutionality of these or any other must carry rules cannot be demonstrated because any mandatory carriage requirements would impose unnecessary restrictions on cable operators' First Amendment rights.

107. We turn next to the question of how well the industry agreement would serve the federal policy interests in the must carry matter. A substantial number of broadcast commenters believe that must carry rules are needed to sustain the important governmental interest in localism. However, some of these commenters do not agree that the industry agreement is the appropriate policy for the preservation of local television service. As was indicated above, several classes of broadcast stations fear that they would not qualify for carriage under the agreement and their ability to serve the public through local television service would be severely curtailed.

108. Proponents of the industry agreement assert that it is consistent with the statutory framework of the Communications Act and would promote diversity of media voices and viewpoints in local television markets. They state that the industry agreement would assure that viewers will continue to have local signals available to them and that local stations will continue to be able to reach the communities they are licensed and required to serve. In their view, the industry agreement is intended to accomplish this end without unnecessary regulation, as is reflected in the market forces that would be the basis for qualification for carriage. They submit that, in this manner, the industry agreement would result in only minimal intrusion on the First Amendment rights of cable operators while protecting the availability of a modicum of local television service.

109. Parties also comment on other elements of the industry agreement. The first of these concerns is the proposed elimination of the network nonduplication rules. Meridian Communications Corporation, the only nonsigner of the agreement favoring this aspect of the proposal, states that the elimination of these cable rules would give cable operators greater discretion to carry signals of their choice and to avoid the overbreadth problem that the court found in the vacated rules. Several small market broadcasters comment that the elimination of this protection is likely to harm them. They state that the nonduplication rules have important benefits, foster localism, and are in the public interest. They claim that without these rules a few large market stations would be able to dominate smaller market affiliates, especially in the West. They also point out that the nonduplication rules were not invalidated by the *Quincy* decision and have no impact on cable operators' First Amendment rights. These parties argue further that repeal of the network nonduplication rules is beyond the scope of the *Notice* and a further rule making proceeding would have to be initiated if such action is contemplated.

110. The industry proposal also prohibits a cable system from accepting any payment for the carriage of a qualified broadcast signal except to defray copyright costs or costs associated with the delivery of a good quality signal. The Nineteen Cable Operators oppose this blanket prohibition against charging for cable carriage, especially for former must carry signals that would no longer qualify. They state that cable access is a valuable commodity which should be allocated according to the demands of free market forces to the greatest extent possible. Further, they believe that this ban goes against the leased access provisions of Section 612 of the Cable Act. Tribune supports the ban on payment since there is a possibility that cable operators would abuse their monopoly position in the marketplace and essentially create a system that assures must carry rights only for the rich.

111. The industry proposal does not require cable systems to carry any transmissions on the vertical blanking interval, such as teletext, or any other signal enhancements, including multichannel sound (MTS). Those commenting on this issue state that any must carry rules should not unconditionally permit a cable operator to strip these portions of the broadcast signals which are intended for all viewers. Additionally, CBS comments that the industry agreement, if adopted, should be amended to require on-channel carriage for viewer convenience.

112. Senator John C. Danforth, in his July 22, 1986, letter submits a proposal intended to follow the basic outline of the industry agreement. Senator Danforth's proposal differs from the industry agreement in several key respects. First, it would require that must carry rules apply only to cable systems that have no direct competition in the franchise area (i.e., "monopoly" cable systems) regardless of channel capacity (i.e., must carry obligations apply to systems with fewer than 21 channels). Second,

the proposal provides that cable systems subject to the rules would be required to devote one-third (33 percent) of their activated channel capacity to carriage of qualified local television stations, and to reserve one-quarter (25 percent) of their set-aside capacity for carriage of public television stations. Third, the proposal maintains the 50-mile zone/viewing standard test for determining commercial stations that qualify for must carry status, but would permit audience measurements to be conducted in noncable, cable, or all television homes, at the option of the local station.[77] Also, it would exempt public stations and commercial stations that have been on the air less than twelve months from the viewing standard, and would make eligible for mandatory carriage translators of public stations.[78]

113. Senator Danforth's proposal also includes several recommendations that concern subjects not addressed in the industry agreement. It would require cable systems to provide A/B switches, by sale or lease, upon request of the subscriber and would implement a narrowly applied waiver procedure for cable systems and local stations. The Senator also suggests that following implementation of must carry rules, the Commission monitor market developments, periodically report its findings to Congress, and from time to time reexamine the rules to determine whether changes are needed.

DISCUSSION

The Federal Interest

114. In recent years, there have been significant changes in the system for providing television service in the United States, particularly with respect to the role of cable television. As commenting cable interests and the court discuss, the cable industry has continued the process of developing new program services and sources that we observed in the *Economic Inquiry Report*. Through this process, the cable industry has evolved from a mere supplemental provider of programming to become more of a direct competitor with the broadcast television industry. In this respect, cable systems currently are the predominant means of distributing satellite-delivered program networks and premium program services to consumers.[79] Moreover, as indicated in the comments, many cable systems are now providing locally originated programming services. We further recognize that some systems are selling time to advertisers on non-broadcast program channels in order to generate revenue. Thus, the cable industry is now a full-fledged video service providing consumers with alternative programming choices that are competitive with the services of broadcast stations. In offering alternative program services to their subscribers, cable operators now function as independent media voices exercising broad editorial control over content.

115. In considering the federal interest in this matter, we observe that our statutory mandate under Sections 151 and 303(g) of the Communications Act is ".to make available, so far as possible, to all the people of the United States, a rapid, efficient.radio communications service" and ".generally encourage the larger, more effective use of radio in the public interest."[80] In furtherance of this statutory mandate, we have consistently pursued policies intended to develop a nationwide television system that maximizes diversity and choice in television services. In recent years, the expansion of cable systems' channel capacity has provided the means for distributing a significantly increased number of program services to viewer households. This additional program delivery capacity has provided opportunities for new program services to develop. In particular, the increased channel capacity of cable systems has made possible the development of satellite-delivered cable networks and premium channels. We find that the introduction of these satellite services distributed by cable systems, and the expansion of cable service as a whole, is fully consistent with the traditional governmental interest in maximizing the choices of television programming available to viewers.

116. Our objective to maximize the program choices available to consumers, particularly through cable services, is now specifically part of our statutory mandate in the Communications Act. In this respect, Congress determined that diversity and competition should be the fundamental underpinnings of federal, state and local government regulation of cable services. This Congressional recognition of our policies, which is set forth in Section 601 of the Cable Act, endorses policies designed to ensure that "cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public" and to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[81] The Congress has also expressed, in Section 307(b) of the Communications Act, its will that broadcasting signals be distributed "among the several states and communities" in a fair and equitable manner. The plan the Commission is adopting, as set forth below, contributes toward both statutory goals.

117. We also observe that the federal interest in ensuring access to program choices includes ensuring access to the service of noncommercial educational television stations. During the interim period under the new rules, we find that a particular rule provision for carriage of noncommercial stations is justified. In this respect, both Congress and the Commission have sought to establish a form of television service that is not subject to the same market forces as commercial broadcast and cable television. For example, in the *Sixth Report and Order on Television Assignments*, Docket Nos. 8736 and 8975, 41 FCC 148, the Commission recognized that noncommercial stations could not compete effectively with commercial stations and so reserved 242 television channels for noncommercial use.[82] Similarly, in enacting the Educational Facilities Act of 1962,[83] Congress provided funds for noncommercial television stations. Congress further affirmed and strengthened the goal of extending noncommercial television when it enacted the Public Broadcasting Act of 1967.[84] Therefore, in order to ensure continued access to noncommercial television service during the interim period for consumers to gain the awareness and capability to receive television signals independently off-the-air, particular provisions of the interim regulatory plan described below pertain to the carriage of noncommercial stations. As with our general rules, we do not believe that signal carriage obligations for noncommercial stations beyond the interim period established today are warranted, given the input selector switch rules and consumer education program established herein.

118. In considering the must carry matter, we find that there are substantial and significant federal interests with respect to maximizing the video programming choices available to consumers. We find that these interests are of sufficient importance that they merit regulatory interven-

tion to ensure viewer access to the maximum number of program choices available through cable and off-the-air broadcast television facilities. However, we recognize that regulations designed to ensure access to program choices also are likely to be intrusive on cable operators' editorial discretion and, therefore, we believe that any such regulations should be limited in both scope and duration to the minimum necessary to achieve the preservation of this access.

119. We observe that our assessment of the federal interest is premised on concerns that differ from those propounded by some of the supporters of the industry agreement; this assessment of the federal interest also is different from that relied upon by the Commission, i.e. Section 307(b), in initially adopting the former must carry rules.[85] However, after considering the changed structure of the overall video market resulting primarily from the emergence of the cable industry as a means for distributing new program services, we conclude that it is no longer appropriate or desirable to treat cable as an auxiliary video distribution service and to protect local broadcast television service from competition with cable service.[86] In this respect, we believe the public interest would be better served by a policy that maximizes program choices, rather than one that that protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers. In general, we believe that it would not serve the interests of video consumers to maintain policies that favor any group of program service providers to the exclusion of other competing service providers, especially where such policies may hinder consumers' access to those competing program services. Our policy decision, as set forth below, is, therefore, designed to maximize the availablilty of program choices by competing providers both off-the-air and on cable.

120. We also are concerned that the First Amendment rights of cable operators not be abridged. In their earliest stage of development, cable systems served exclusively as passive retransmitters of broadcast signals. As cable systems have expanded their services to include programming from other sources, the editorial role of cable operators has grown accordingly. This editorial function whereby cable operators select and tailor their program mix to meet viewer interests or other objectives is akin to that performed by publishers of print media. Like the *Quincy* court, we recognize that concomitant with the expanding role of cable systems in providing program services is the expansion of cable operators' editorial discretion which is protected by the First Amendment.[87] Thus, any regulations we may consider in furtherance of our maximizing programming choices and competition goals must be weighed in terms of their impact on cable operators' and cable programmers' First Amendment rights.

The Need for Regulation

121. The central issue in the must carry matter is the perception that cable systems may be able to preclude access by their subscribers to off-the-air broadcast signals. This perception derives not from any inherent characteristic of cable service, but rather from cable subscribers' current expectation that broadcast signals will always be available as part of their basic cable service. This expectation is a direct result of the former must carry rules, which, in fact, required cable systems to carry all available off-the-air broadcast television signals. The expectation that local broadcast signals will be carried by their cable system has caused many subscribers to perceive that there is no need to install or maintain the capability to receive broadcast signals off-the-air. Cable operators have evidently encouraged this view. However, the technology of cable service does not necessarily preclude the use of antennas and other equipment for independent off-the-air reception of television signals.

122. Therefore, as evidenced by data discussed below, when consumers subscribe to cable service, they tend to disconnect, and in most cases dismantle, antennas used with existing receivers. From the data it is also apparent that where cable subscribers connect new state-of-the-art television receivers to cable service, they often also do not connect those receivers to antennas. In addition, under the former must carry rules, most cable subscribers were unfamiliar with, and indeed had no reason to be familiar with, an input selector device for choosing between cable and off-the-air broadcast service. As a result, most cable subscribers have come to perceive that their only means of access to off-the-air signals is through their cable service. This has led to the perception that cable has the power to function as a gatekeeper, determining which local broadcast signals will be available to the cable subscriber. Thus, we recognize that our former must carry rules have created a misperception on the part of cable subscribers which needs to be corrected before economic forces can be relied upon to achieve maximum diversity in program choices for the public.

123. Our review of the cable industry indicates that its development has progressed such that cable is now becoming a major factor nationwide. As shown on Table 1, cable service is now available to 76 percent of the television households nationwide and cable subscribership is now 47 percent nationwide. This contrasts with levels of homes passed and cable penetration of 44 percent and 19 percent respectively in 1979, when we last examined the economic relationship between cable and broadcast television. It also is expected that cable will continue to expand in the future. According to a recent study by Arthur D. Little, Inc., the number of cable households will increase to 48 million by 1990. Using International Communications Research's estimate that there will be 94 million TV households in 1990, this translates to 51 percent cable penetration by 1990. Table 2 shows that cable penetration is highest in smaller markets and that this pattern has remained relatively stable over time and with increasing levels of cable penetration nationwide.

124. As revealed by the ELRA study submitted by NAB, it is plain that cable subscribers now generally have not installed or maintained the antennas and associated equipment necessary for satisfactory reception of broadcast signals off-the-air. In addition, other research indicates that the increased cable penetration in recent years has been accompanied by a decline in dependence on antennas for reception of television signals. This phenomenon is evidenced by the data in Table 3, which indicates decreases in the number of outdoor and indoor antenna sales of 35 percent and 26 percent respectively. While sales of antennas are declining, sales of cable-ready television receivers that are intended primarily for use with cable service have tripled in the same period and now comprise 58 percent of the total TV receivers sold. Cable-ready television receiver growth is shown on Table 4.

125. From the above, it is plain that cable systems have sufficient reach to affect almost one-half of the potential audience for broadcast television service in communities nationwide, and that this reach is even greater in smaller markets. Also, the available information on antenna use and sales indicates that cable subscribers in general currently do not have the antennas in place to provide satisfactory reception of off-the-air broadcast stations that are not carried on their cable systems. Further, the data on TV receiver sales show that cable-ready sets now command more than one-half of the market and that the market for these receivers appears to be continuing to grow. We believe this information demonstrates a trend away from reliance on off-the-air reception of television signals. Thus, we find that the current misperceptions by subscribers and their resulting behavior, coupled with the growth of cable service nationwide, have produced the result that cable television systems have a perceived ability to affect access to broadcast television service by a substantial portion of the population. We believe this perceived ability is likely to persist in the absence of a shift in subscriber awareness and practices with respect to maintenance of effective off-the-air reception capability.

126. Because cable subscribers have not perceived the need to maintain or install antennas and input selector switches, their access to off-the-air broadcast signals is limited to those carried by the cable system to which they subscribe. If we did not adopt interim must carry rules now, until our long-term regulatory plan to educate consumers on the need for independent access to off-the-air signals and to make input selector switches available takes hold, harm to the public interest would ensue. Subscribers would be disadvantaged by not being able to view broadcast signals dropped by their cable system. This harm would result even though cable systems do not create a barrier *per se* to use of antennas for receiving broadcast signals off-the-air. In this respect, the UHF antenna terminals of most currently used television receiver are not affected by connection of cable service, and the VHF antenna terminal can be used for off-the-air reception if the cable service is connected through an input selector switch.[88] Thus, it is subscribers' current misperception that it is not necessary to have direct off-the-air access to broadcast signals that impedes the ability of broadcast stations that are not carried on cable systems to compete for the attention of cable subscribers.

127. As indicated above, we believe that competitive market mechanisms generally are the most appropriate method for assuring that the interests of consumers are satisfied. In the instant case, the increased competition resulting from the emergence of independent cable programming benefits the public by providing additional viewing choices and by leading broadcasters, cable operators, and cable programmers to be more attentive to viewers' program interests and preferences. Competition, coupled with the additional program channels typically provided by cable systems, also helps promote the availability of a greater variety of programming from diverse sources. In this regard, an open, competitive market where there is potential for access by all suppliers of video program services should operate to provide the mix of programming and viewing choices that most effectively meets public demand. In addition, a competitive market would ensure that television services and facilities are provided at the lowest cost to all parties. We further note that a competitive market would promote these desirable industry performance results without government regulatory intervention.

128. We also recognize that a competitive market may not lead cable operators to carry all of the television signals that can be received off-the-air in their communities. But such a result furthers the public interest if cable systems are able to replace an off-the-air signal with a signal from another source for which their subscribers would have a greater preference. Moreover, so long as cable subscribers are aware that they can receive the signal off-the-air, their overall program choices are maximized. While cable systems and broadcast stations compete directly in many respects, they are also complementary in others and it is clear from the record that cable systems do have incentives to carry broadcast stations. Thus, in cases where a cable system chooses not to carry a particular broadcast station, it does not necessarily indicate a public harm, but may simply reflect the fact that there is not sufficient demand for the station by the system's subscribers to warrant carriage. This is particularly likely to be the case for limited channel capacity systems where there are strong incentives to use the available channels for the most popular programming.

129. In this regard, we recognize that other program sources, such as the many satellite networks, make strong contributions toward satisfying the informational and entertainment needs of the public. We further observe that "cable satellite programming" as defined in Section 705 of the Cable Communications Policy Act of 1984,[89] is an important source of programming for many noncable subscribers, particularly in rural areas, through home satellite dish (HSD) facilities.[90] In view of the fact that satellite programmers' current primary means of access to viewers is through cable systems, the public's interest in satellite cable programming warrants recognition in our decision making process on the must carry matter.

130. An environment where consumers have maximum access to the available viewing choices, which our two-part regulatory program is designed to achieve, also contributes to the furtherance of the goals under our traditional interpretation of Section 307(b) of the Communications Act that television signals be distributed " . . .among the several States and communities." in a fair and equitable manner.[91] In this regard, we believe that the additional program sources that have flourished during the cable industry's growth, in particular the many satellite networks, contribute to this goal.

131. There is only limited direct evidence available concerning the behavior of cable systems in the absence of must carry regulation and the effects of such behavior on their subscribers' program choices. While cable systems generally have continued to carry those stations that are available off-the-air in their communities in the period since the *Quincy* decision, there is evidence in the record that some cable systems have ceased to carry individual broadcast stations, refused to carry new stations, and/or requested payment for carriage of stations. In this regard, the reports of the experiences of commercial and noncommercial stations with respect to carriage by cable systems, coupled with the information on cable subscribers' practices with respect to maintaining independent off-the-air reception capability, indicates that some cable subscribers currently may not have access to all of the broadcast signals available in their area. In considering the evidence of cable industry behavior in the

absence of must carry rules, we are also aware that many cable operators thus far may have been hesitant to act as if there were no such rules in view of the appeal by the NAB and others of the *Quincy* decision and our pending rule making in this matter (and NCTA leaders have apparently suggested to members that they continue to carry local signals until this matter is settled).

132. We find the FTC study of SMATV signal carriage practices to be somewhat instructive in that, to the extent that SMATV systems and the economic environments in which they operate resemble the cable industry, it provides indication that economic forces are not likely to lead cable systems to carry all of the broadcast signals available off-the-air in their local communities and that the number of broadcast signals carried by cable systems operating in an unregulated environment is likely to be influenced by the availability of other program services. However, this study does not provide any definitive information about cable signal carriage practices in the absence of must carry rules or the effects of such practices on cable subscribers' access to the available off-the-air broadcast signals.

133. In summary, we find that the current practices of consumers with respect to connecting their television sets to cable systems has led to the perception that cable operators have the ability to limit their subscribers' access to broadcast television signals. This misperception is inimical to the public interest in that it tends to frustrate our federal objectives of maximizing program choices and promoting a fair and open competitive market environment that will produce programming that meets viewers' interests and preferences. The rapidly evolving cable industry with its changing economic incentives makes it difficult to provide an accurate forecast of the effects of the signal carriage practices of cable systems in the absence of must carry rules on viewer access to program choices. What is clear, however, is that a substantial number of cable subscribers have not maintained independent off-the-air reception capability. As a result, many subscribers currently would not be able to view those broadcast signals not carried by cable systems. We also find that there is ample evidence that cable penetration nationwide has reached a level where there is potential for this problem to affect a substantial portion of the population.

134. Thus, we conclude that some form of regulation is necessary to correct these undesired effects of our former rules in order to prevent them from further hindering the achievement of our federal objectives concerning cable and broadcast television service. Such regulation must be designed to give viewers the capability to preserve and reestablish their independent access to the available off-the-air program choices and to promote a competitive industry structure that will foster the development of new program choices. In addition, any regulation must achieve these objectives in a manner that will be least intrusive on the First Amendment rights of cable operators and cable programmers.

TABLE 1

Growth of the Broadcast and Cable Industries

	1972	1975	1979	1983	1986
TV Households (millions)	65	70	75	83	86
Total TV Stations	905	958	992	1095	1206
Commercial TV Stations	699	711	732	802	898
Affiliates	607	625	620	623	628
VHF	476	483	485	501	485
UHF	131	142	135	122	143
Independents	92	86	112	179	270
VHF	34	30	31	25	39
UHF	58	56	81	154	231
Noncommercial TV Stations	206	247	260	293	308
VHF	89	95	102	114	117
UHF	117	152	158	179	191
Cable Television					
No. of Systems	2841	3506	4150	4825	6844
Homes Passed (millions)	11	20	33	45	65
Homes Passed (%)	17	29	44	54	76
Basic Subs. (millions)	6	9.8	14	28	40
Penetration (%)	9	14	19	34	47
Pay Subs. (millions)	0	0.5	5	23	22

Sources: Television Digest's Television Factbook; Broadcasting's Yearbook; Arbitron's Markets and Rankings Guide; Cablevision, April 11, 1983, at 69; Cablevision, February 10, 1986, at 56; Television & Cable Factbook, Handy Pocket Directory of Television Stations in Operation, March 1985; and 1986 Cablefile.

TABLE 2

Cable Penetration By Market Rank

Market Rankings	1972	1976	1980	1984
All Markets	10.8	15.1	22.1	43.0
1 - 25	7.4	10.2	15.7	36.5
26 - 50	9.4	15.5	22.9	46.4
51 - 100	11.9	17.5	26.2	48.0
101 - 150	20.6	24.8	33.9	52.5
151 - end	33.9	40.3	47.6	59.3
1 - 10	8.4	10.6	14.0	33.6
11 - 20	8.5	10.2	14.2	37.5
21 - 30	5.0	12.2	20.0	42.7
31 - 40	7.2	10.8	19.0	44.0
41 - 50	13.0	20.5	29.2	49.5
51 - 60	9.2	15.5	23.1	47.8
61 - 70	11.4	11.7	21.5	47.6
71 - 80	9.5	21.5	30.3	50.9
81 - 90	9.0	18.6	26.8	46.0
91 - 100	17.8	20.0	29.5	47.6
101 - 110	11.7	22.4	27.1	48.2
111 - 120	16.0	20.4	40.8	55.5
121 - 130	20.1	26.6	33.2	53.9
131 - 140	19.7	23.3	31.3	48.2
141 - 150	30.7	31.4	37.1	56.7
151 - 160	28.3	38.9	47.0	53.7
161 - 170	29.1	32.9	37.6	56.2
171 - 180	32.6	34.4	45.1	57.0
181 - 190	35.7	44.0	52.9	66.0
191 - 200	42.3	47.5	53.3	65.2
201 - end	35.3	44.9	49.2	57.9

Sources: Arbitron's 1972 Television Market Analysis, Television Markets and Rankings Guide 1976 - 1977, 1980 - 1981 Television Markets and Rankings Guide, and 1984 - 1985 ADI Market Guide.

TABLE 3

	Indoor Antennas		Outdoor Antennas	
	Units	Dollars	Units	Dollars
	(thousands)		(thousands)	
1980	3,141	19,624	2,318	45,136
1981	3,405	21,751	2,218	44,597
1982	2,917	20,904	1,964	41,123
1983	2,319	15,596	1,945	41,768
1984	2,035	13,565	1,709	37,518

Source: EIA, The Electronic Market Data Book, 1981 through 1985 editions, Table 5-19 (data from "TV and FM Accessory Parts," Report No. MS429). "Indoor antenna" is defined as an antenna capable of receiving VHF, UHF or a combination of VHF and UHF television signals and not an integral part of a TV receiver. Such antenna is designed to mount on the top, back or side of a TV receiver. An "outdoor antenna" is defined in the same manner except that it is specified as designed for outdoor mounting.

TABLE 4

Sales of Cable Compatible TV Sets

	Number of Color TV Units	Percent of Total TV Sales
1981	3,896,534	33.1%
1982	5,181,645	44.4
1983	6,568,843	45.9
1984	9,621,471	58.1

Source: EIA, The Electronic Market Data Book, 1985, Table 1-8, at 12.

Policy Decision

135. In view of the above, we have determined that the most appropriate course of action is to adopt a plan that will make cable subscribers aware of the need for the capability to access broadcast signals directly off-the-air and will actively assist the development of such capability. Such an approach is consistent with our general belief that market mechanisms are the preferred method for ensuring that the interests of consumers are satisfied. We also recognize that our former must carry rules have contributed to the creation of a distorted market environment which needs to be corrected before economic forces can be relied upon to achieve maximum diversity in program choices for the public. In view of the fact that most cable subscribers now are unaware of the need to receive broadcast signals off-the-air and are unprepared to do so, it is likely to take a considerable period of time to educate them with respect to the need for direct access to broadcast services and to allow them sufficient opportu-

nity to acquire such capability or to make an informed choice that such a capability is not desired. Thus, we believe that in the short-term, it is necessary to adopt an approach that also will ensure that viewers continue to maintain access to broadcasting, so that it remains a competitive alternative source of programming even as consumers move toward an environment without must carry rules.

136. To implement this course of action, we have developed a two-part regulatory program which is designed first to alter existing practices and knowledge with respect to connection of cable service that can render cable subscribers unable to receive broadcast television service and, second, to provide interim must carry protection to the broadcast television industry during the transistion to the new environment in which the connection of cable service no longer has that effect. Under the first part of our new regulatory program, we will require cable systems to provide their subscribers with input selector switches that will enable reception of broadcast signals by means of an antenna. In addition, we will require cable systems to implement a consumer education program to inform their subscribers of the purpose, and need for, maintaining off-the-air reception capability after subscribing to cable. The second part of our program provides for interim must carry rules that will expire at the end of a five-year period. The transitional must carry rules we are adopting are comprised in large part of the terms of the industry agreement, with certain modifications to ensure that the rules maximize the public interest. The modifications to the industries' proposals include specific protections for noncommercial stations operating on reserved channels and new commercial stations and to maintain our existing nonduplication rules.

137. We believe a five-year transition period will provide sufficient time for consumers to become aware of the need for direct off-the-air access to broadcast signals and to acquire such capability if they so desire. Accordingly, the interim must carry rules and certain aspects of the input selector requirements as discussed below will expire on January 15, 1992. We plan to initiate and conclude a rule making proceeding sufficiently prior to this expiration date to determine whether there are particular situations where mandatory carriage rules might continue to be necessary.

138. We emphasize that it is out of an abundance of caution and concern for the significant governmental interest in maximizing diversity in consumers' program choices that we are imposing must carry rules until it can be assured that there has been sufficient opportunity for cable subscribers to reestablish independent access to broadcast service.[92] In this respect, we recognize must carry rules are a stringent form of regulation that intrude on cable operators' free speech rights. Although we have found that consumers would have difficulty receiving off-the-air signals at present, the part of our regulatory plan pertaining to input selector switches and consumer education is expected to resolve this problem. Accordingly, we find no need or justification in this proceeding for imposing must carry requirements for more than a five year period. We conclude that must carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals and, in fact, would impede our objective of maximizing program choices to viewers. While we have found that short-term must carry regulations are necessary in order to ensure that broadcasting remains a competitive alternative source of programming in the interim period, the record clearly supports no more extensive regulatory program than that which we are adopting. In this respect, the transitional rules are no broader or more extensive than necessary to provide an orderly shift to a less regulated environment. The interim must carry rules are considerably narrower in scope than those vacated in *Quincy* and are specifically tailored to the need for regulation. Thus, we believe they meet the constitutional concerns expressed by the court. We note that the interim rules are less intrusive on cable operators' editorial discretion than the former rules in that they will apply only for a specific limited period of time.

139. We are confident that, in the long run, this plan will ensure viewers' access to broadcast signals off-the-air and, thus, the greatest viewer choice should be maintained. However, in order to achieve the policy objectives we have set forth herein, it is essential that all of the major features of this program, in particular, the input selector switch, education program, and interim rules with firm expiration date, be implemented. If any of these articulated elements were to be deleted, the remaining portions of the program might not be sufficient to achieve our objectives.

Description of the New Rules

I. Input Selector Switch Rules

140. The new rules for developing and maintaining the capability of cable subscribers to receive broadcast signals off-the-air require that cable operators offer to install an input selector switch for use with an antenna at no additional cost for all new cable subscribers, thereby leaving the subscriber in the same position to receive off-the-air signals as before cable installation.[93] This is a continuing requirement that will not expire at the end of the transition period. The new rules also require cable operators to offer existing subscribers an input selector switch at no cost, by providing all such subscribers with a form that is to be returned by those who desire a switch. On that form, an existing subscriber will select the option of either receiving the switch with self-installation instructions or, alternately, requesting that the cable operator install the switch, in which case the subscriber can be charged reasonable labor costs. This offer shall be made by the cable operator in writing within six months of the effective date of this *Order* and on an annual basis thereafter for five years. There is no continuing requirement for cable operators to offer input selector switches to existing subscribers after the conclusion of the five-year transition period. In other respects, the rules concerning input selector switches apply identically to both existing and new subscribers. First, the switch must be provided to all cable subscribers, whether or not the cable system carries all local television broadcast signals.[94] Second, as described in further detail below, the operator must provide information to the subscriber concerning the function of the switch. Third, in all instances, cable operators must offer to supply and install an input selector switch for each separate television set to which the cable is connected.[95] Fourth, cable operators will be required to inform subscribers that an antenna may be needed to receive television broadcast signals. Fifth, cable operators will not be permitted to suggest or recommend that subscribers dismantle their antennas.

141. In addition, the new rules will impose a continuing requirement for cable systems to inform subscribers of the changes in the regulations concerning carriage of broadcast signals and of the need for input selector switches. These rules will require cable operators to inform their subscribers annually that not all signals are required to be carried; that after January 15, 1992, no signals might be carried; and thus that it may be necessary to use an antenna in conjunction with an input selector switch to receive available off-the-air broadcast stations not carried on the cable system. In addition, cable operators must include a description of the function of an input selector switch and that its purpose is to aid the viewer in preserving independent access to off-the-air television service. Cable operators must also inform the subscribers which local broadcast signals are not at that time carried by the cable system. The information must state further that the input selector switch will assist subscribers in receiving those local stations available off-the-air that may not be carried on the system. This consumer education information must be provided to new subscribers at the time of installation of cable service and to existing subscribers that do not have input selector switches within six months after the effective date of this *Order* and thereafter on an annual basis. The annual requirement may be satisfied by including the information with the annual input selector switch offering, in monthly subscriber billings or other mailings.

142. With respect to the technical performance characteristics of input selector switches, we recognize that there is potential for signals from the cable system to leak into the antenna input terminal if the two signal paths in a switch are not sufficiently isolated. Such undesired signal leakage would be radiated through the antenna and could cause significant interference to licensed radio services and to the operation of other radio frequency devices. In order to prevent such possible interference, all input selector devices installed to provide switching between a cable television system and an antenna for reception of off-the-air broadcast television signals will be required to comply with the technical standards of §15.606(a) of the rules.

II. Interim Must Carry Rules

143. Under the transitional signal carriage rules we are adopting, cable systems will be required, subject to various conditions, to devote a limited portion of their capacity to carriage of qualified broadcast television signals. A cable system's mandatory carriage obligations under the revised rules will vary according to the number of usable activated channels available on the cable system. "Usable activated channels" are defined as those channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, less channels reserved against interference with aeronautical frequencies. This definition is the same as that specified in the Cable Act for other areas of cable regulation.[96] Broadcast stations will qualify for carriage under these rules on the basis of several criteria. Any station not qualifying for must carry status may be carried at the cable operator's discretion. However, carriage of such stations will not count towards meeting a cable system's signal carriage obligations under the interim rules.

144. *Qualified Broadcast Stations.* All domestic full-service broadcast stations will be eligible to qualify for carriage under these rules. Noncommercial educational translators operating at 100 watts or more of power and located in the cable community will also be eligible to qualify for carriage. Broadcast stations licensed by foreign governments, satellite stations, low power television stations, commercial translators, and subscription television stations are not entitled to carriage under the new rules.[97] To qualify for carriage, a commercial or noncommercial broadcast station must be licensed to a community that is within 50 miles of the cable community, as measured from the principal cable headend to the reference point of the station's city of license as defined in Section 76.53 of our rules.[98] In the case of cable systems with multiple headend facilities, the cable operator shall specify which such facility is the principal headend.

145. Commercial broadcast stations also must meet a viewing standard to qualify for mandatory carriage on a cable system. To meet this standard a commercial station must demonstrate that it attains at least an average share of total viewing hours of 2 percent and a net weekly circulation of 5 percent in noncable households in the county where the cable system is located.[99] However, a new commercial station will be exempt from demonstrating that it meets this viewing standard for its first 12 months of operation.[100] Additionally, stations that have commenced operation after July 19,1985, the effective date of the suspension of the former must carry rules, and stations that have commenced operation since that time will not be subject to the viewing standard for one full year from the effective date of the interim rules. Also, no viewing standard will apply to otherwise eligible noncommercial educational stations or translators operating on reserved channels.

146. A commercial broadcast station shall demonstrate that its audience during the required survey period meets the viewing standard on the basis of independent professional audience surveys conducted according to recognized statistical methodology. Audience surveys must be based on the viewing of the subject station in noncable homes in the county where the cable system is located. If the cable system serves homes in more than one county, the appropriate measure will be for the county in which the plurality of subscribers reside. In cases where the generally accepted practice for audience measurement is to report statistics on a split county or independent city basis, these areas will be acceptable as the appropriate geographic unit for the audience survey.[101]

147. Stations that have been on the air for more than one television survey season will qualify for carriage upon showing that they met the viewing standard during the previous television survey season. televison survey season will be defined as the period between April 1 of one year and March 31 of the following year. The showing must be based on four 4-week survey periods, with at least one survey period in each of the 4 quarters of the television survey season (i.e., April-June, July-September, October-December and January-March). The survey methodology must be comparable to that of surveys conducted to demonstrate significantly viewed status pursuant to Appendix B of the *Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972).[102] To the extent that the regularly published reports of the major audience rating services (e.g., Arbitron and A.C. Nielsen) meet

these criteria, they may be used to satisfy these requirements. However, a showing that a station meets the viewing standard for a qualified station may be based on audience surveys conducted by any independent professional survey organization.

148. Commercial stations that have been operational for less than a full television survey season, except new stations that have been on-the-air less than 12 months, may demonstrate that they meet the viewing standard for qualifying for must carry status on the basis of a special study conducted by an independent professional surveying firm.[103] The study must demonstrate that the subject station meets the viewing standard on the basis of audience surveys covering a period of at least two weeks.[104] The survey must be based only on viewing in noncable homes in the county where the cable system is located. In this respect, we believe it is more appropriate to define qualified signals in terms of those actually available off-the-air and that the viewing patterns of noncable households are likely to provide better indicators of such signals than the alternative approach proposed by Senator Danforth. In order for the sample to be representative of the viewing in the cable system's county, the distribution of the noncable homes sampled for this showing must be proportional to the noncable population distribution of the appropriate county. The level of viewing in the sample households may be measured using any recognized surveying technique (i.e., diary, telephone, or meter). Further, the sample size shall be sufficient to assure that the average audience statistics reported are at least one standard error above the required viewing level for a qualified station.

149. Additionally, in order to qualify for must carry status a television broadcast station must deliver a "good quality" signal to the principal cable headend. The standard we are adopting requires that such signal equal or exceed a high picture quality in which interference may be just perceptible.[105] Because a station's signal is processed at several points throughout a cable system, we believe this level of quality at the headend is necessary to provide enjoyable viewing to cable subscribers. The subjective nature of this standard generally would require that systems carry signals of qualified television broadcast stations that provide a minimum signal level of -45 dBm for UHF signals and -49 dBm for VHF signals at the input terminals of the signal processor at the principal cable headend.[106] In general, these levels would be needed to achieve the above picture quality.[107] We recognize that in some instances cable systems currently may not have equipment capable of receiving broadcast signals of the required quality. In such circumstances, a broadcaster would be permitted to furnish any equipment or to compensate a cable operator for equipment necessary to upgrade existing reception capability or to provide direct feed of baseband signals. Broadcast stations also will be permitted to deliver their baseband video/audio signal directly to cable systems via alternative means such as a landline or microwave facility.

150. *Signal Carriage Obligations.* The number of qualified broadcast stations a cable system must carry is determined by its number of usable activated channels. Cable television systems with 20 or less usable activated channels only will be required to carry one qualified noncommercial educational station or translator. When more than one noncommercial station or translator qualifies for carriage on a cable system, the cable operator may choose the station or translator to carry. If no qualified noncommercial educational station is located within a 50-mile zone of the cable system's headend and no translator of a noncommercial educational station is located in the cable community, then the system is exempt from must carry obligations.

151. Cable systems with more than 20 usable activated channels, but less than 27 such channels, are required to devote up to 7 channels to the carriage of qualified broadcast signals. Cable systems with 27 or more usable activated channels must devote up to 25 percent of their channel capacity to fulfill their mandatory carrriage obligations. For purposes of determining the number of usable activated channels that would be allocated for qualifying must carry signals, calculations should be rounded to the nearest whole number. For example, a system with 45 usable activated channels would not have to devote more than eleven channels to must carry signals (i.e., 25% of 45 is 11.25 or 11 when rounded to the nearest whole number). A system with 46 such channels would be required to devote not more than 12 channels (i.e., 25% of 46 is 11.5 or 12 when rounded). Using this formula, systems with 21 to 29 usable activated channels would have to devote a maximum of 7 channels for must carry signals, those with 30 to 33 channels would have to allocate up to 8 channels, those with 34 to 37 channels would have to devote at most 9 channels, etc. A chart detailing the maximum number of channels that a system must devote to qualified must carry signals is set forth in the rules in Appendix B.

152. Further, cable systems with more than 20, but less than 54 usable activated channels, must allocate at least one must carry channel for the carriage of a qualified noncommercial educational station or translator, if at least one such station is eligible for carriage. Cable systems with 54 or more usable activated channels must devote at least two of these channels to the carriage of qualified noncommercial educational stations or translators, assuming two or more such stations are available.

153. Where the number of qualified stations is less than or equal to the maximum number of channels that the system must devote to such stations, the cable system will be required to carry all qualified stations. There are two exceptions to this requirement. First, a cable system will not be required to carry duplicating commercial stations. That is, a cable system need not carry more than one station affiliated with the same commercial network. The decision to carry more than one affiliate of the same commercial network will be at the discretion of the cable operator.[108] Further, in cases where both a satellite and its parent television station qualify for carriage, the cable system need not carry both stations and may choose between them. We note that there will be no similar exemption from the carriage of noncommercial educational stations that are affiliated with the same network.[109] However, cable systems will not have to carry a noncommercial station and its satellite or translator station(s).[110] Second, a cable system will be permitted not to carry an otherwise qualified station that is considered a distant signal for copyright purposes. This situation could occur because the proposed 50-mile zone in some cases creates over an area that is larger than its rights under the former must carry rules and there is a possibility that a station could qualify for carriage under the revised must carry rules and be considered a distant signal under the Copyright Act. If the system carries a station that is subject to

this exception, the system is permitted to count the station in determining whether the system's limit on carriage of qualified stations has been satisfied.

154. Where the number of qualified broadcast stations exceeds the maximum number of channels that a cable system is required to devote to must carry signals, the cable system may choose among the qualifying stations, subject to the requirements for carriage of qualified noncommercial educational stations or translators. There is no requirement that the cable operator select at least one station affiliated with each of the major commercial networks.

155. *Manner of Carriage*. Cable systems will be required to carry qualified broadcast signals that are carried in fulfillment of must carry obligations in their entirety without material degradation, as part of their lowest-priced, separately available tier of service.[111] By carriage in their entirety, we mean that the cable system must carry the primary video and accompanying audio transmissions of all programs in full, without deletion or alteration. Retransmission of any ancillary services in the vertical blanking interval or aural baseband, including but not limited to multichannel television sound and teletext, will be at the discretion of the cable operator. The rules do not require a cable system to provide on-channel carriage of any qualified station. A cable operator may carry qualified broadcast stations on any channel or frequency, so long as those carried in fulfillment of any must carry obligation are carried on the lowest-priced, separately available tier of service offered by the cable system.

156. Changes in the network nonduplication rules were not a part of this proceeding and are not being changed substantively herein.[112] As a consequence of this, situations may arise in which signals that are defined as "qualified" for mandatory carriage under the transitional must carry rules may be subject to partial deletion under the network nonduplication rules. The rules specifically account for this possibility. In this respect, cable systems will not be required to extend network nonduplication protection to qualified stations that they are otherwise not required, and choose not, to carry.

157. Cable systems will be prohibited from accepting any payment or other consideration from qualified stations carried in fulfillment of must carry obligations with two limited exceptions.[113] First, qualified stations carried to fulfill must carry requirements will be allowed to reimburse a cable operator for any copyright fees associated with the station's carriage. Second, such broadcast stations will be permitted to pay any costs related to the requirement that they deliver a good quality signal to the cable system's headend, including the cost of installing additional receiving or transmitting equipment and of using CARS or common carrier microwave links. We recognize that the requirements stated in this paragraph are different from those proposed in the industry agreement.

158. A broadcast station seeking carriage as a qualified must carry signal will bear the burden of establishing this right. A broadcaster that believes its station is qualified for mandatory carriage rights must submit a request for carriage in writing to the cable operator and include sufficient evidence to demonstrate that its station meets the criteria set forth in the rules. Within 30 days of receiving a request for carriage, a cable operator must provide the broadcaster with a written response. If the cable system declines carriage of the requesting station, it must give a brief statement of the reasons for its decision. A cable system that refuses a request for carriage, but complies in good faith with these requirements, will not be subject to any forfeiture or other penalty if it is later determined that the station is entitled to carriage.[114]

159. In general, we are hopeful that broadcasters and cable operators will be able to determine carriage rights without the intervention of the Commission. However, in instances where the broadcast station and the cable system cannot agree on the station's must carry rights, the broadcast station requesting carriage may petition the Commission for a determination of its rights. The petitioning station will bear the responsibility of convincing the Commission that it satisfies the mileage and viewership standards and that the cable system is not otherwise carrying its limit of qualified television stations. Where a cable operator refuses to carry a station on the ground that the station does not deliver a good quality signal to the system's headend, the station will bear the burden of proving with appropriate engineering data that it meets this requirement. If the Commission determines that a station is entitled to carriage, it will then order the cable system to add the station. A cable system may be assessed a forfeiture or other penalty for failure to comply with a Commission order to carry a qualified broadcast station. Commission action in such cases will also include action by the Mass Media Bureau under delegated authority.

The New Rules Meet the Need for Regulation

160. The new regulatory program we are adopting is intended to protect and further the federal interest in maximizing consumers' viewing choices. The first objective of this plan is to alter the manner in which consumers have permitted their independent access to off-the-air broadcast signals to be limited once they subscribe to cable. Consumers who can receive signals both via cable and off their antennas will have their program choices maximized. We, therefore, seek to prohibit cable systems from diminishing the off-the-air reception capability of new subscribers, and to require them to aid existing subscribers in regaining their off-the-air reception capability. To this end, consumers will be educated on the need to maintain the capability to receive broadcast signals independent of their cable system, will be instructed as to how to do this, and will receive an input selector switch to enable them to connect an antenna in conjunction with their cable service.

161. We have determined that a requirement for cable systems to offer an input selector switch and consumer information to their subscribers is warranted as the appropriate long-term policy to ensure that viewers retain both the awareness and capability to receive signals off-the-air. We find that rules enhancing the availability of input selector switches to viewers and the dissemination of information concerning their need and purpose will help attain the important governmental interest of maximizing the program choices available to the public. In this regard, the maximization of cable subscribers' program choices is furthered by ensuring the opportunity to receive all off-the-air broadcast signals as well as cable offerings. Indeed, their choices are then increased if not all off-the air signals are duplicated on cable, but, rather, cable channels are freed up for other programming that viewers are unable to receive off-the-air. The capability to receive signals directly off-the-air, which will be facilitated

by these switches, also is beneficial in that it will preserve subscribers' ability to receive broadcast signals in the event of outages of cable service and will provide a means for access to ancillary services, such as teletext, that may not be carried by the cable system.[115]

162. Noncable subscribers' viewing choices also will be substantially enhanced to the extent that cable subscribers use input selector switches to access all off-the-air broadcasting, thereby increasing broadcast station audiences and revenues. In addition, even rural viewers who must rely on television receive only (TVRO) satellite equipment will have their viewing choices substantially enhanced by this requirement, as increased cable channel capacity for satellite programmers can be expected to provide a spur to the economic market of such programmers, thereby increasing the likelihood that additional satellite programming will be developed.

163. We are confident that the switch requirement, coupled with the consumer education program, will ensure that all cable subscribers become aware of the need for off-the-air reception capability and have the opportunity to acquire such capability. In this respect, our previous concerns that input selector switches would be inconvenient and, therefore, not used by consumers, no longer appear valid in the context of the search for acceptable solutions that are minimally intrusive on cable operators' editorial discretion in the post-*Quincy* environment. We are convinced that once cable subscribers become accustomed to using off-the-air reception on an equal basis with cable service, then cable systems no longer will have an artificial ability to limit their subscribers' access to over-the-air broadcast signals.

164. There is evidence that video consumers are now becoming accustomed to switching between alternate program input sources. We observe that many cable systems now offer services through dual cables in order to provide greater channel capacity.[116] Such systems employ switching devices to select between the two cables and often mark the switch positions with "A" and "B" designations. Cable subscribers apparently have accepted this switching arrangement and do not find it inconvenient. In addition, cable systems operating with two cables often provide their subscribers with remote control converter devices that permit selection of the cable as well as the channel to view.[117] We note that consumers also have become familiar with switching between alternative program sources through use of VCRs. We believe that switching between cable and off-the-air reception is essentially the same as these existing program source switching options and that consumers will accept cable/broadcast input switching as simply another program source option. We have no evidence that cable subscribers will not accept such switching devices and cannot accept such a result where the alternative is a regulatory regime that infringes on cable operators editorial discretion. Indeed, it was exactly this kind of assumption that led the court in *Quincy* to strike down our former rules.

165. We are aware that some broadcasters are concerned that input selector switches would not be a satisfactory means for ensuring that cable subscribers have independent access to broadcast stations. We believe that many of these concerns are overstated and that the rest can be mitigated or resolved by development and improvement of new and existing input selector switches to meet particular needs. We decline to reject a solution which we have concluded will achieve our goal in a manner that is least intrusive on editorial discretion and that is conducive to maximization of viewer program choice on the basis of minor technical considerations that can be resolved through equipment redesigns. In the past, there has been no incentive to develop input selector switches to meet a variety of different technical demands because few consumers had reason to use such devices. Our recognition that there may be room for improvement in the technology of input selector switches is, however, one of the reasons why we are continuing our interim must carry rules for five years.

166. Broadcasters argue that input selector switches would not provide effective off-the-air reception because very few cable subscribers have maintained outdoor antennas and local regulations and/or multi-unit residences in many cases preclude installation of such antennas. Our five-year interim rules are specifically designed to ensure access to local broadcasting in the period before it can be reasonably expected that subscribers can regain their off-the-air accessibility. The relatively low cost and simple installation of indoor antennas can be expected to make it easy for cable subscribers to acquire the capability to receive broadcast stations not carried on cable. The argument that outdoor antennas are sometimes prohibited ignores the fact that in many of these situations it is possible to receive signals of acceptable quality using an inexpensive indoor, set-top antenna. This is particularly the case where subscribers are located within the Grade A signal of the station. While indoor antennas would not prove satisfactory in all such cases, we believe their use can significantly mitigate the antenna availability problem. Attic antennas which can give additional off-the-air reception capability are also available. The consumer education program required under the new rules will encourage cable subscribers to acquire and maintain antennas for off-the-air reception of television signals, be they of outdoor, attic, or indoor designs.

167. As broadcast commenters observe, use of input selector switches in conjunction with VCRs may pose installation complexities and in some cases may require use of additional equipment. We believe that any equipment compatibility problems can be overcome through relatively minor modifications to switching devices and that cable operators and other equipment suppliers can provide the information and/or assistance consumers may need to install the switches for use with VCRs. We also believe that the problems with respect to use of input selector switches in conjunction with cable-ready receivers can be overcome through proper matching of the switches with the input requirements of the receivers. We note further that many of these concerns may become moot if television receivers begin to be manufactured with switching or interface devices built in.

168. We also recognize broadcasters' arguments that many cable operators now encourage subscribers to disconnect their antennas and/or offer to assist in removing them. We consider this practice to be inconsistent with our federal objectives and, therefore, are including provisions in the new rules to require cable operators to inform their subscribers that an antenna may be necessary to receive broadcast television services and to prohibit them from promoting abandonment of off-the-air reception capability.

169. In order to achieve the long-term goal of maximizing program choices to all viewers, we need to preserve cable subscribers' access to broadcast programming and to

ensure that broadcast television remains a competitive alternative source of programming during the transition to the new environment. The interim must carry rules will meet this objective by preventing disruption of the flow of television services to the public during a five-year implementation period and by facilitating an orderly transition to a new market environment in which must carry regulation is no longer necessary because consumers have both the awareness and capability to use switching devices to alternate between cable and broadcast program sources.

170. As discussed above, preservation of commercial broadcasting as a competitive alternative source of programming during the transition to an environment without must carry rules is essential to the federal interest of maximizing program choices to all viewers. In this regard, we believe that the 50-mile zone/viewing standard formula for defining the qualified status of commercial stations will ensure that viewers have access to the most popular stations available off-the-air in the cable community. In addition, the exemption from the viewing standard for commercial stations that have been on-the-air for less than one year affords new stations an opportunity to gain a foothold in the market, thereby furthering our interest in maximizing program choices by fostering entry into the market. On the other hand, the interim must carry rules will provide cable systems with opportunity to tailor their program service offerings to viewer preferences. In this respect, the rules limit the portion of a cable system's available channel space that is to be devoted to mandatory carriage of broadcast signals in a manner that will permit all cable operators with opportunity to provide programming from other sources.

171. While we recognize that to exempt cable systems with 20 or fewer channels from any obligation to carry commercial stations does not serve to further our goal of protecting the broadcast service during the transition period, we nonetheless believe that this is necessary in view of the strong constitutional concerns that must be balanced against any must carry regulation. However, we do not expect that this exception will substantially affect the achievement of the objectives of our transition policy. In this regard, we note that at this time, only 31 percent of all cable systems, serving 23 percent of all subscribers, have less than 20 channels.[118] We expect that these proportions will decrease during the five-year period as these generally older cable systems respond to consumer demand for additional program services and rebuild using state-of-the-art equipment. We also believe that the provision for proportional increases in signal carriage requirements for larger cable systems based on their individual channel capacity and the exemption from required carriage of duplicate network signals adequately balances the need to ensure an orderly transition to a new environment without must carry rules with the need to protect the cable operators' opportunities for exercising their editorial discretion.

172. We also have modified the industry agreement to provide mandatory carriage protection for noncommercial educational stations. We recognize that some cable systems with 20 or fewer channels may consider it an imposition to carry one noncommercial station. However, the federal interest in ensuring the continued accessibility to and availability of the alternative programming provided by noncommercial educational stations is sufficiently important to warrant the imposition of such a requirement in the interim period. In this respect, we believe that the public interest value of noncommercial educational broadcasting justifies requiring cable systems with 54 or more channels to carry at least two qualified noncommercial broadcast or translator stations. The provision for carriage of noncommercial translators, as proposed by Senator Danforth, will ensure the availability of noncommercial television service to cable subscribers in areas unable to support a full service station. In view of the proportional manner in which this requirement is imposed, which is similar to the requirement concerning carriage of commercial broadcast stations, we believe that here too we have struck an appropriate balance between the competing needs to provide access to noncommercial educational programming and to protect cable operators' opportunities for exercising their editorial discretion during the five-year interim period.

Alternative Proposals Considered and Rejected

173. In developing our policy decision in this matter, we considered a wide range of policy options, including the various proposals submitted by the petitioning and commenting parties in this proceeding. We have incorporated many of the specific features of these proposals, or modifications thereof, into the new rules. However, we also have rejected many other proposals on the grounds that they would exceed our statutory authority, would be overly intrusive on cable operators' editorial discretion, or simply would not meet our regulatory objectives as well as the plan we have chosen. In order to provide additional insight into our policy decision, we believe it is useful to indicate our reasons for rejecting the major alternatives presented in the record.

174. One alternative approach, proposed by Richard Leghorn, with respect to the input selector switch requirement, would be to require that all new television receivers be built with integral switches for selecting between cable and off-the-air television service. The attractive feature of this approach is that it would assure that, over time, all viewing households would have the capability to switch between cable and off-the-air service without the need for a requirement that a switch be provided by the cable system. However, we have rejected this option on the basis that it is ultimately an inefficient means to distribute input selector capability. The need for cable/broadcast input selector capability pertains only to those consumers that subscribe to cable service; noncable subscribers have no need for such capability. We see no need to impose the additional cost of a built-in input selector switch on consumers who have no need or desire for it.[119] Thus, we do not find it desirable to require all receivers to be built with a feature intended for use by only approximately one half of the TV households nationwide. In addition, cable subscribers purchasing cable-ready receivers may prefer a more sophisticated independent stand-alone input selector device, and thus, not have need for such capability to be built into their receiver. In view of these considerations, we believe that market forces are the most appropriate means to lead the television receiver industry to produce sets equipped with capability to switch between cable, broadcast, and other program sources. In this respect, market forces will determine both the number of sets to be equipped with input selector features and the specific design of those features.

175. As described above, Mr. Leghorn also proposes to exempt cable systems from requirements to provide input selector switches to their subscribers if they carry all local

VHF signals. This proposal is attractive in that it would provide a way to minimize the impact of our new program on the cable industry without significantly altering the mix of services offered by individual cable systems from that which could be expected to obtain under the plan we have chosen. In this respect, we observe that most cable systems already carry all of the local VHF stations, and because these stations are generally popular with viewers, would continue to so in the absence of regulation. However convenient this approach might be for both the cable and broadcast industries, it nonetheless would be directly contrary to our stated goals to correct the misperception that has resulted from our former must carry rules and to provide a regulatory environment that will maximize viewers' access to video programming. To provide regulatory encouragement for cable systems to carry all of the local VHF stations would tend to perpetuate the misperception that it is not necessary for cable subscribers to maintain independent off-the-air reception capability. Such a policy also would hinder the attainment of our program access goals by providing a strong incentive for cable systems to devote a portion of their channel package to a fixed package of services rather than encouraging them to tailor their service directly to viewer interests. We also observe that carriage of all VHF signals would not ensure access to all of the available off-the-air signals for subscribers using cable ready receivers because such receivers generally disable their UHF antennas when operated in the cable ready mode. Finally, a policy that offered strong incentive to cable systems to carry all of the local VHF signals would operate in a manner much the same as our former must carry rules and thus would impose the same type of overintrusive, nondiscriminatory regulatory protection ruled constitutionally unacceptable by the court in the *Quincy* decision.

176. The proposals of INTV and Grace Cathedral would provide strong incentives for cable systems to carry broadcast stations by conditioning the availability of the cable compulsory copyright license on carriage of all local stations. Similarly, CBS's proposal to require cable systems to obtain retransmission consent from originating stations, except from local stations where all such stations are carried, potentially would conflict with the cable compulsory copyright license. Regardless of our authority in this area, an issue which we need not reach here, the INTV, Grace, and CBS proposals would reimpose broad must carry rules that would be difficult to sustain under the *Quincy* decision. Therefore, as a policy matter, we find these proposals unacceptable.

177. Other proposals for new must carry rules, such as those submitted by the Catholic Conference and UCC, attempt to meet the constitutional concerns of the *Quincy* court by extending carriage rights only to limited classes of local television stations that they believe are at risk or that offer specific kinds and/or amounts of local program service. These proposals are designed to protect certain classes of local broadcast stations and to further local broadcast television service consistent with our previous cable signal carriage policy. They are not well suited to the current need for must carry rules during the transition to the new regulatory environment and would, in fact, tend to hinder rather than promote viewer access to the maximum program choices in the interim period. In this respect, policies that promote the carriage of specific types of programming generally hinder a cable system from carrying the services its subscribers most desire to watch. Such regulation also is more intrusive on cable operators' editorial discretion than the rules we are adopting.

178. We find that the proposal to reimpose restrictions on cable carriage of distant broadcast signals in larger markets submitted by Henry Geller and Donna Lampert in their petition for rule making filed subsequent to the *Quincy* decision[120] raises issues generally outside the scope of this proceeding. We intend to address the distant signal and syndicated exclusivity issues in future proceedings.

179. Finally, we do not believe that it is appropriate at this time to eliminate the existing network nonduplication rules as proposed in the industry agreement. This proceeding is focused on the mandatory signal carriage rules and, therefore, is not an appropriate forum for addressing whether the network nonduplication rules should be retained or eliminated. As discussed below, we intend to initiate a separate proceeding to fully address the issues in the network nonduplication matter.

CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

First Amendment Issues

180. *Standard of Review*. The threshold issue in reviewing the constitutionality of any mandatory carriage requirement is the appropriate standard of review. While the United States Supreme Court has expressly recognized that cable television operators engage in conduct protected by the First Amendment,[121] it has not definitively addressed the appropriate standard[122] to be utilized in evaluating the constitutionality of cable regulation.[123] In the absence of explicit Supreme Court guidance, the lower federal courts have employed divergent tests and the matter remains unsettled.

181. Several appellate courts have determined that there are special characteristics of cable television which warrant the application of a special standard of scrutiny that differs from and is lower than the one governing the print media. For example, in *Omega Satellite Products Co. v. City of Indianapolis* (Omega Satellite),[124] the Seventh Circuit applied a lower standard of scrutiny analagous to the one applied to broadcasting services,[125] in reviewing the constitutionality of cable regulation. The court articulated three reasons for rejecting the print model as the appropriate standard of review. First, while noting that spectrum scarcity does not exist for cable services, the court stated that "cable television involves another type of interference -- interference with other users of telephone poles and underground ducts."[126] Second, it determined that there were "apparent natural monopoly characteristics of cable television"[127] which justified the application of a different lower standard of scrutiny. Third, citing *FCC v. Pacifica Foundation* (*Pacifica*),[128] a case involving traditional broadcasting services, the court indicated that "the universal access to the home that television enjoys and the resulting felt need to protect children"[129] warranted application of a lower constitutional scrutiny standard.

182. Similarly, the Tenth Circuit, in *Community Communications Company v. City of Boulder, Colorado*,[130] expressly determined that "[t]he attributes of cable broadcasting technology"[131] justify the application of a distinct and more relaxed standard[132] in assessing the constitutionality of cable regulation than is employed in evaluating governmental restrictions on the press.[133] In applying a lenient standard, the Tenth Circuit indicated that gov-

ernmental regulation could be justified in order to assure "that optimum use is made of the cable medium in the public interest."[134]

183. More recently, other federal circuit courts have expressly repudiated the notion that there are specific attributes of cable television which would warrant use of a lower constitutional standard of scrutiny. For example, in applying generally applicable First Amendment standards for cable television, the District of Columbia Circuit in *Quincy Cable TV, Inc. v. FCC* (Quincy)[135] emphasized that a "fundamental[ly] significant"[136] distinction between broadcasting and cable is that the former is subject to the physical limitations of the electromagnetic spectrum.[137] Emphasizing that "the 'scarcity rationale' has no place in evaluating government regulation of cable television"[138] and that "the analogy to more traditional media is compelling,"[139] the court concluded that the broadcast standard of scrutiny was inapposite in evaluating the constitutionality of cable regulations. The court found unpersuasive arguments that the alleged natural monopoly characteristics of cable television[140] or the potential disruption attendent upon stringing coaxial cable in a public right of way would justify use of a lenient standard of review.[141] The Ninth Circuit, in *Preferred Communications, Inc. v. City of Los Angeles*,[142] has also recently rejected the application of the lower broadcasting standard of scrutiny to cable television for many of the same reasons articulated by the District of Columbia Circuit.

184. Given the unsettled nature of the law in this area, as reflected in the cited judicial opinions, there is no single standard absolutely compelled by case precedent. Nonetheless, we find persuasive the more recent court analyses which conclude that cable's First Amendment rights are subject to a stringent review, rather than the relaxed review used by courts for broadcasting.[143] We do not find that the rationales for applying a lower First Amendment scrutiny standard analogous to that adopted for broadcasting in *Red Lion Broadcasting Co. v. FCC*,[144] are persuasive or are sufficiently likely to prevail on review that regulations should be based thereon.[145]

185. Rejecting a lower standard of scrutiny based upon the allegedly "unique" characteristics of cable television does not decide the issue of whether the rules adopted in this proceeding comply with the First Amendment.[146] In determining whether or not a governmental regulation comports with the strictures of the First Amendment, the courts have differentiated between governmental actions imposing incidental burdens on speech and those which are content-based. Whereas the former are assessed under the balancing standard enunciated in *United States v. O'Brien* (*O'Brien*),[147] content-based regulations are subject to a far more stringent standard.[148] Before the constitutional permissibility of the mandatory carriage regulations we adopt today can be assessed, therefore, it must be determined which standard is applicable.

186. The *Quincy* court acknowledged that the Commission's former must carry rules were not intended to suppress or protect any particular viewpoint. *Quincy*, slip op. at 35. Nevertheless, the Court "had serious doubts" whether the rules should be evaluated under the *O'Brien* standard because of the nature of the First Amendment intrusions they effected. The court focused on the rules' effect on cable operators' editorial autonomy and noted that they were designed to favor one group of speakers (local broadcasters) over another (cable programmers). The Court was especially concerned that, in systems substantially occupied by mandatory signals, cable programmers are shut out entirely from the only forum capable of carrying their programming, *Id.* at 36, "even if that result directly contravenes the preference of cable subscribers." *Id.* at 39.

187. Subsequent to the Court of Appeals' decision in *Quincy*, the Supreme Court has again given guidance on how to analyze whether a particular regulation is content-based. In *City of Renton v. Playtime Theatres, Inc.* (*Renton*), 106 S. Ct. 925 (1986), the Court upheld as content-neutral a zoning regulation that imposed more stringent requirements upon adult theatres than upon other kinds of theatres. The regulation clearly had the effect of discriminating between classes of speakers; nevertheless, the Court determined that the *Renton* ordinance was "completely consistent" with the Court's definition of content-neutral speech regulations because the ordinance "was *justified* without reference to the content of the regulated speech." *Id.* at 929 (emphasis in original).[149] In other words, the Court focused not on the incidental First Amendment effects of the regulation, but on the fact that the ordinance's primary *purpose* was not content-based. *Renton* thus indicates that the fact a regulation distinguishes between classes of speakers is not dispositive of its content-neutral or content-based status; rather the Court's analysis centered on the purposes underlying the regulation. Where the regulation is not designed to promote or suppress particular *viewpoints*, it is deemed content-neutral.[150] As the Court noted, this approach is fully consistent with the First Amendment's underlying purpose; namely to ensure that "'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'" *Id.*

188. Like the former must carry rules (and the zoning regulation in *Renton*), the objective of the interim rules is unrelated to the enhancement or suppression of any particular opinion or viewpoints. The interim rules are designed solely to maintain the benefits of consumers' access to competitive video services during the transition period for the purpose of maximizing diversity of programming; they are not intended to prefer broadcast viewpoints over those of cable operators or programmers. Thus, the rules are not like the constitutionally infirm "right of reply statute" struck down in *Miami Herald, supra*, in which the reply obligation discriminated on the basis of viewpoints because it was triggered by a particular category of newspaper speech and was awarded only to those who disagreed with the newspaper's views. *See also Pacific Gas, supra*, 106 S. Ct at 910.[151] Even though the interim rules might be seen as giving access to certain broadcasters, this access is not dependent upon the expression of particular viewpoints by the cable operator, nor is the carriage right based upon the viewpoints expressed in a particular broadcaster's programming. Thus, employing a *Renton* analysis, which would apply to newspapers as well as to cable, it appears that the interim must carry rules may properly be classified as content-neutral.

189. We believe that many of the First Amendment burdens singled out in *Quincy* as casting particular doubt on the must carry rules' content-neutral status go not to whether *O'Brien* is the appropriate test, but rather to whether the rules can be justified in light of the ancillary burdens on speech that they impose. In any event, we have attempted to reduce or eliminate these burdens

under the interim rules. Unlike the former rules, the interim must carry rules are configured to ensure that a cable system's capacity will not be saturated by mandatory signals, so that the effects on cable operators' editorial discretion and cable programmers' access to the public are no more severe than necessary and certainly less severe than under the former rules.[152] We have examined this issue solely by reference to the principles set forth by the existing Supreme Court precedents, most recently in the *Renton* case. We are satisfied that, under the existing precedent, the interim must carry rules are content-neutral for purposes of determining whether *O' Brien* is the appropriate standard.[153]

190. *Application of the O'Brien Standard.* As the Court of Appeals stated in *Quincy*, under an *O'Brien* analysis, a content-neutral regulation "will be sustained 'if it furthers an important or substantial governmental interest and . . . if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"[154]

191. As noted above, we have determined that the narrowly crafted mandatory carriage regulations that we are adopting today are necessary as interim measures to preserve the availability of the program choices to consumers, including broadcast signals, and to ensure that broadcasting has a fair opportunity to compete with cable until it can be assured that viewers have the knowledge and capability to receive off-the-air signals not carried on cable at which time the interim mandatory carriage rules will no longer be required to assure competition. These objectives, in our view, constitute a sufficiently important interest to satisfy the first part of the *O'Brien* standard.

192. We recognize that the District of Columbia Circuit suggested in *Quincy* that the Commission failed to demonstrate that its former must carry rules furthered a substantial governmental interest. In this regard, the court stated that the mere invocation of a laudatory regulatory objective was not colorably sufficient to withstand constitutional scrutiny under the first part of the *O' Brien* standard[155] and emphasized that the government, under the *O'Brien* standard, bore a "heavy burden"[156] in demonstrating the importance of the regulatory interest. Applying this standard, the court found that the Commission had failed to satisfy, by empirical data, its affirmative obligation to obtain support for the assumptions underlying its analysis.[157]

193. As reflected by subsequent Supreme Court case law, however, we believe that the court in *Quincy* required a more vigorous documentation of the substantiality of the governmental interest than is necessary under the first part of the *O'Brien* standard. In *Renton*, the Supreme Court concluded that a zoning ordinance involving adult theaters furthered the substantial governmental purpose of preserving the quality of urban life despite the absence of any specific studies demonstrating that regulatory intervention was needed to vindicate the city's asserted interest in enacting the ordinance.[158] As long as the governmental entity relies upon evidence that it reasonably believes is relevant, the Court determined that new studies supporting the governmental action were not necessary. The Court thus expressed its willingness to accept the interest identified by the governmental entity as substantial as long as that entity reasonably believes that the evidence supporting that interest bears some relation to the problem that the regulation is designed to correct.

194. Irrespective of whether or not the court in *Quincy* applied a proper burden of proof, however, we believe that the need for rules, including temporary provisions requiring the carriage of off-air television broadcast stations, in order to foster the governmental interest in maximizing diversity of program choices and in fostering competition among program sources constitutes a substantial and compelling government interest. In this regard, we have conducted a thorough and searching inquiry regarding whether or not the imposition of regulations governing signal carriage of cable systems is necessary to further our responsibilities under the Communications Act. We have carefully considered the comments of record and concluded, at this time, that the regulations adopted herein are in fact necessary to avoid potentially adverse effects on the range of program alternatives available to the public.[159] We believe that the evidentiary basis for this conclusion – which is set forth in the Need for Regulation section, above – amply satisfies the requirements specified under the first part of the *O'Brien* standard.[160]

195. Under the second part of the *O'Brien* standard, a governmental agency is accorded a substantial degree of discretion in the manner in which it effectuates a regulatory purpose.[161] In this regard, the Supreme Court has stated that:

[R]egulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.[162]

While the court, in *Quincy*, recognized that "its duty to police the First Amendment's requirement that intrusive governmental action be corrected does not imply the authority to 'finetune' administrative regulation,"[163] and that "[a]n agency typically has broad discretion over the manner in which it endeavors to effect its public interest objectives,"[164] it nonetheless found that the prior must carry rules were not sufficiently narrow in scope to justify their substantial infringement on the constitutional rights of cable operators. Indeed, characterizing the must carry rules as "fatally overbroad," the court stated that "it is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives."[165]

196. Unlike the former mandatory carriage rules invalidated in *Quincy*, we believe that the interim rules adopted in this proceeding are narrowly tailored to further our stated objectives. Indeed, with respect to overbreadth, our new mandatory carriage rules are different in several critical respects from the rules struck down in *Quincy*. For example, in *Quincy* the court stated that the Commission's former mandatory carriage rules: apply with equal force regardless of the degree of intrusion on First Amendment freedoms. They draw no distinction between cable systems that carry 100 signals and those that carry 12. Nor do they distinguish between systems that are saturated with must carry signals and those that are not.[166]

By generally exempting cable systems with 20 or less activated channels and by providing for absolute limitations on the number of stations that a cable system must carry, however, which are scaled to the number of activated channels, our new rules guarantee that a signifi-

cant amount of the programming capacity of cable operators will not be subject to mandatory carriage requirements. In this regard, the new regulations remedy infirmities in the prior must carry rules that the appellate court found to be "[e]specially troubling."[167]

197. The court in *Quincy* also criticized the former mandatory carriage rules for "indiscriminately protect[ing] each and every broadcaster . . . irrespective of the number of local outlets already carried by the cable operator."[168] The rules we adopt today do not contain that deficiency. The rights of a "qualified" local broadcast station to carriage depend upon the number of other "qualified" stations in the community as well as the channel capacity of the cable operator. Accordingly, we believe that these rules fulfill our vital objective of maximizing program choices for viewers by providing limited, transitional protection to the over-the-air broadcasting system, yet do so in a manner which is least restrictive of the editorial discretion of cable operators.

198. Certain parties to this proceeding in effect contend that any rules that fail to provide protection for stations in financial need, such as struggling UHF stations, are not sufficiently tailored. These parties essentially argue that a failure to adopt rules that specifically aid stations they perceive to be "deserving" renders those rules constitutionally infirm. We disagree. Our objective in adopting these rules is neither to penalize nor to benefit any particular station. Rather, our objective is to temper, during an interim period, potential threats to the program source diversity provided by the system of "broadcast*ing*. " This goal is critically distinct from any asserted interest, which we do not espouse, in protecting the service of particular "local broadcast*ers*. "[169] We have provided for an initial twelve-month period in which new stations, regardless of viewership, will be eligible for must carry status. This should afford new facilities an opportunity to establish a marketplace position before becoming subject to the viewing standards in the new rules. We believe this approach is necessary to adequately protect the "entry" mechanism of the broadcasting system. Beyond this "new" station exception, however, we believe that the use of a viewership test as a qualification for mandatory carriage of commercial stations properly balances our interest in the continued availability of programming alternatives offered by the traditional, free broadcast television system and our interest in according the broadest possible editorial discretion to cable operators.[170]

199. Finally, with respect to appropriate tailoring of our new regulations, it is critical to note that we have restricted them both in scope *and* in duration. While we believe that our interim mandatory carriage rules are sufficiently narrowly tailored to satisfy *O' Brien*, we recognize that any such rules nevertheless restrict cable's editorial discretion. Accordingly, we have designed these rules so that they will continue no longer than necessary and we have paired them with ongoing requirements relating to input selector switches and consumer education so that we can rely on the latter rather than the former as soon as possible. The mandatory carriage requirements imposed here will automatically terminate in five years and are specifically designed to facilitate a transition to an unregulated environment where free and open competition in the marketplace of ideas will govern the success or failure of programming, whether it is delivered by cable or by broadcast television.

200. In conclusion, we believe that the rules which we adopt today satisfy the requirements of the First Amendment. These rules narrowly further the important governmental interest in maximizing program choices and preserving competition in video services, yet they are limited in both scope and duration to maximize the ability of cable to achieve full participation in the information services marketplace by preserving (under the compulsory licensing system) the ability of cable operators to freely exercise their editorial discretion and to thereby respond to their viewers needs.

Other Statutory and Constitutional Concerns

201. Several commenters opposed to must carry requirements argue that the Commission is prohibited from adopting new rules by Section 624 of the Cable Act[171] and Section 326 of the Communications Act.[172] Also, some opponents assert that must carry rules constitute a taking in violation of the Fifth Amendment.

202. *Comments*. Several cable parties argue that Section 624 of the Cable Act prohibits the Commission from reimposing mandatory carriage obligations on the part of cable operators. The 19 Cable Operators contend that Section 624 demonstrates a strong recognition by Congress of the First Amendment rights of cable operators consistent with the findings of the *Quincy* court. American Television and Communications Corporation (ATC) states that a central theme of the Cable Act generally, and Section 624 in particular, is to increase cable operators' editorial discretion and to limit the ability of federal, state and local governments to influence cable programming content. In this regard, it claims that Section 624(b) prohibits the government from dictating the programming provided over a cable system.[173] ATC cites the House Report as underscoring the point that "[a] franchising authority is not permitted to establish particular service requirements which involve the provision of specific information to subscribers."[174]

203. ATC, 89 Cable Operators filing joint comments (89 Cable Commenters) and others state that the provisions of Sections 624(*f*)(1) and (2) of the Cable Act bar the Commission from adopting new rules.[175] They argue that since the must carry rules were declared unconstitutional, they no longer exist and, therefore, there are no rules that can be amended. They conclude that the Commission cannot either retain or amend the rules that were in place on September 21, 1983. ATC asserts that the Commission thus is placed in "statutory stalemate."

204. The 89 Cable Commenters and the North Carolina CATV Association also argue that the anti-censorship provision in Section 326 of the Communications Act prohibits any must carry regulations.[176] They argue that such rules "interfere with the guaranteed rights of the cable operator and its subscribers to receive, free of governmental supervision or pressure, available, lawful communications of their choice."

205. ATC further contends that any must carry rule that confers an absolute right on a broadcast licensee to occupy some portion of a cable operator's channel capacity, thereby denying the operator use of that channel for other purposes, constitutes a governmental taking of property without just compensation. In this regard, ATC argues that must carry rules provide uninvited access to private cable property by local broadcast stations and require permanent use in violation of the Fifth Amendment.[177]

206. *Evaluation.* We are unpersuaded that either the Cable Act, the Communications Act, or the Fifth Amendment prohibit the Commission from adopting new interim must carry rules. Turning first to the Cable Act, we believe that Congress was cognizant of the need to maximize program choices and to maintain an open, competitive market for television services in formulating legislation that would afford cable operators broad discretion over the content of their program services. Congress' recognition that an unbridled cable industry might destructively unbalance the nation's television system is evinced in the legislative history describing the need for the Cable Act. The legislative history states that "in adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming."[178] It is against this backdrop that Congress adopted Section 624 of the Cable Act.

207. With respect to ATC's assertion concerning Section 624(b) of the Cable Act, we observe that this provision only applies to franchising authorities. Inasmuch as the Commission is not a franchising authority, we conclude that Section 624(b) does not affect the Commission's authority to adopt interim must carry rules.

208. Section 624(f) melds together Congress' concerns for cable operators' editorial discretion and a competitive balance among providers of video programming. On the one hand, Congress limited the Commission's authority to affect the provision or content of cable services and, on the other hand, it lent its approval to such regulations by grandfathering those rules in place on September 21, 1983, and authorizing their subsequent amendment. In this regard, the only Commission regulations explicitly referred to in the House Report on the Cable Act are the former must carry rules. The House Report states that "[r]egulations which relate to the content of cable service and which remain in effect include the FCC's must-carry requirements."[179]

209. We believe that this specific reference by Congress to the must carry rules and provision for their amendment by the Commission is an expression of Congress' intention that the Commission continue to have the authority to regulate to maximize viewers' program choices and to promote a competitive environment for video services. Whereas Congress did not contemplate the court finding the must carry rules unconstitutional, we do not read the Cable Act as codifying the must carry rules or precluding their amendment.

210. We next address the jurisdictional issue raised in connection with the anti-censorship provision of Section 326 of the Communications Act. We believe that this provision also is not a statutory impediment to interim must carry rules. One of the primary thrusts of this proceeding is that regulations affecting cable television must be reconciled with free speech considerations. In this respect, in Section 326 of the Communications Act, Congress made clear its expectation that our regulations would be consistent with the First Amendment. As discussed herein, we believe that the rules we are adopting are consistent with the First Amendment under an *O'Brien* analysis and, therefore, we conclude that they do not transgress Section 326 of the Communications Act.

211. Finally, we find that the concerns raised in connection with the Fifth Amendment do not present a constitutional bar to the rules we are adopting. We believe that must carry rules are not a "taking" against private property for public use without compensation. In this regard, the relevant constitutional test applicable in cases involving regulations under the Communications Act was articulated long ago and is still valid today:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right of compensation, on account of such injury does not attach under the Constitution. When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of property without compensation is alleged, the test is whether restrictive measures are reasonably adapted to secure the purposes and objects of regulation. If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not unconstitutional taking of property without compensation or without due process of law."[180] As established above, we believe that the transitional must carry rules are reasonably related to our federal objectives with respect to television service and further believe they do not prevent a reasonable use of the property.[181] We conclude, therefore, that these rules do not result in an unconstitutional taking of property.[182]

OTHER REGULATORY FACTORS AFFECTING TELEVISION MARKETS

212. In determining the need for regulation in this proceeding, we found that the former must carry rules contributed to the creation of a misperception on the part of cable subscribers which needs to be corrected before market mechanisms can be relied upon to achieve maximum diversity for the public. At this juncture, we also observe that there appears to be a number of factors and policies outside the scope of this proceeding that also create disequilibria in the competitive marketplace that may adversely affect viewers' access to program choices. First and foremost among these is the cable television industry's exemption from negotiating in the market for copyrighted broadcast program material, an exemption provided by the compulsory copyright licensing system enacted ten years ago. The effects of this exemption were magnified by the subsequent repeal of the syndicated exclusivity rules in 1979. Moreover, the Commission's prohibition against local telephone companies' ownership of cable television systems, and the exclusivity provisions in many local franchising agreements, have further insulated cable systems from some types of actual or potential competition.

213. The enactment of the compulsory copyright law, the repeal of the syndicated exclusivity rules, the federal prohibition on cable-telephone company cross-ownership, and the nonfederal restrictions on intramodal competition were undertaken in the interests of what were then perceived to be policies overriding whatever distortions in the market happened to have been created by these actions. Given the progressive maturation of the cable industry and the tensions created by the development of the video distribution market during the last several years, we believe it appropriate to reassess whether, in light of current conditions, these measures continue on balance to truly maximize consumer choice in programming options or to otherwise serve our public interest objectives. Our action today is supportable in its own right based on the

evidence adduced in the record, independent of any examination of these matters or conclusions reached thereon. We believe it appropriate, however, to conduct a larger independent evaluation of the cable industry. Therefore, we have directed the staff to take the following actions:

*With respect to the question of exclusive franchises for cable systems, the Office of General Counsel will participate in the remand proceedings ordered in the Supreme Court's decision in *City of Los Angeles and Department of Water and Power v. Preferred Communications, Inc.*[183] and in any other case(s) raising the issue of whether exclusive cable television franchises comport with the First Amendment;

* The Mass Media Bureau and the Office of Plans and Policy will prepare inquiries to study the effects of the compulsory copyright licensing scheme, the absence of syndicated program exclusivity, and the effect of the network program exclusivity rules on maximizing consumer choice in the programming options available on cable television and broadcast television. The results of these inquiries will be used by the Commission as the bases for possible rule making and/or legislative proposals, as appropriate.

* The Common Carrier Bureau will prepare a Notice of Inquiry to obtain information on the question of the restriction on cable ownership placed on local exchange telephone companies, to develop possible legislative proposals, if appropriate.

214. In addition, we are recommending that Congress begin its own review of those aspects of the television market structure that pose impediments to a fully competitive environment for program services. In particular, we urge that Congress examine the efficacy of the compulsory copyright licensing system in light of the comments of the Department of Justice, the National Telecommunications and Information Administration, and others in this proceeding. We intend to transmit to the Congress upon its completion the report of the Commission on the benefits and drawbacks of retaining the current compulsory licensing system for purposes of possible amendatory legislation, and we are prepared to work with the Congress in the interim on this matter should our participation be so requested.

PROCEDURAL MATTERS

215. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. *Need for and purpose of the rules.*

The Commission's mandatory signal carriage requirements were ruled constitutionally invalid in *Quincy Cable TV, Inc. v. FCC*. After examination of the record, the Commission determined that the most appropriate course of action in this matter is to adopt a regulatory program that will provide an orderly transition from the current situation where there is need for must carry regulation to its long term objective of developing an environment in which consumers will be able effectively to choose between cable and broadcast television program services. The first part of this two part program requires cable systems to offer their subscribers input selector switches that enable use of an antenna in conjunction with cable service and to implement a consumer education program to inform subscribers that it may be necessary to have off-the-air reception capability to receive all of the available broadcast signals. These requirements are intended to eliminate, over time, the current perceived capability of cable systems to limit their subscribers' access to over-the-air broadcast stations. The second part of this program consists of interim must carry rules that will expire at the end of five years. These rules will provide for an orderly transition to a market environment where must carry regulations are no longer necessary. During the transition period, the input selector switch requirement and consumer education program will work to gradually supplant must carry rules and assure subscribers' access to local television broadcast stations.

II. *Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.*

A. *Issues Raised.* No commenting parties raised issues specifically in response to the initial regulatory flexibility analysis. However, several parties objected to imposing new must carry rules specifically on small cable systems, and other parties representing small broadcast stations supported the need for such rules. We believe that the interim must carry rules we are adopting impose a minimal burden on both large and small cable systems. We believe that our new requirements are particularly sensitive to the needs of small cable systems in serving their subscribers by not requiring systems with fewer than 20 channels to carry any stations other than one noncommercial educational station. The new rules will also not impose a significant burden on cable systems because they condition carriage on a system's usable channel capacity, thus ensuring that small cable systems are not overly burdened by must carry requirements. At the same time, these interim requirements will ensure that cable subscribers are not suddenly deprived of signals, particularly those of noncommercial educational stations. Likewise, we believe that the new rules consider the needs of small commercial and noncommercial stations by not requiring noncommericial stations or stations that have been operational less than 12 months to meet the viewing standard criteria to qualify for carriage.

The input selector switch requirements and consumer education program will impose some cost burdens on all cable systems. The cost of supplying and installing the switch for new subscribers and of making the switch avaliable to existing subscribers who choose to have it will be absorbed by cable systems. However, the switch is a low-cost item on a wholesale basis, and we anticipate that manufacturers will supply the switch to cable operators at volume discounts. In addition, installation costs will be minimal, since the switch will be installed at the same time that cable service is installed for new subscribers. Furthermore, the on-going nature of our requirements will spread the cost to the operator over an indefinite time period. We also believe that the cable operator will derive some benefits in the marketing of cable service by offering the switch to new subscribers. While we recognize that these requirements impose burdens on cable operators, we believe they are necessary and justified in light of the importance of our federal objectives.

We also recognize that the consumer education program will impose some burden on cable systems. However, we expect that cable operators will be able to consolidate these requirements with other system functions such as regular mailings. In fact, the consumer

education program may benefit cable systems by providing a new opportunity for communication with subscribers. In addition, switch manufacturers may help reduce cable operators' burden by supplying them with switch installation instructions appropriate for use by consumers.

B. *Assessment.* As stated in our initial regulatory flexibility analysis, we anticipate that the interim mandatory carriage requirements will have significantly less impact than our previous must carry requirements. While the input selector switch requirements will impose new burdens on cable operators, we believe they are necessary to the achievement of our federal objectives.

C. *Changes made as a result of comments.* While no parties filed comments concerning the initial regulatory flexibility analysis, many parties suggested alternative regulatory policies in the general comments. Our final decision in this matter reflects our consideration of these proposals and the affect of our policies on small business entities in both the broadcast and cable industries.

III. *Significant alternatives considered and rejected.*

We have considered all the alternatives presented in the *Notice* and those presented in the record in this proceeding. After full consideration of all of the issues raised throughout the course of this proceeding, we have adopted rules that we believe are the most reasonably fashioned in light of the facts and issues presented.

216. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public. Implementation of these new/modified requirements and burdens will be subject to approval by the Office of Management and Budget as prescribed by the Act.

217. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§601 *et seq.*, (1981)).

218. Accordingly, IT IS ORDERED THAT under the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules and Regulations IS AMENDED as set forth in the attached Appendix B, subject to approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980. These rules and regulations ARE EFFECTIVE January 15, 1987.

219. IT IS FURTHER ORDERED, THAT good cause not having been shown, the "Emergency Motion to Terminate Proceeding or, Alternatively, to Defer Action," filed August 4, 1986 by Cole, Raywid & Braverman IS DENIED.

221. IT IS FURTHER ORDERED, THAT this proceeding and those in Docket Nos. 21323, 81-741, and 84-168 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] The issues left open in Docket Nos. 21323, 81-741, and 84-168 relating to cable carriage of multi-channel television sound, program-related teletext, and program-related communications on the vertical blanking interval also will be addressed herein. *See Memorandum Opinion and Order* in Docket Nos. 21323, 81-741, and 84-168, adopted February 8, 1985, 50 FR 11000.

[2] 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 54 U.S.L.W. 3806 (U.S. decided June 9, 1986) (No. 85-502).

[3] An input selector switch is any device that enables the viewer to select between cable service and off-the-air reception of broadcast signals. Although such devices are often referred to as "A/B" switches, they may, in fact, be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

[4] The parties endorsing this agreement are the National Association of Broadcasters (NAB), The Association of Independent Television Stations (INTV), the Television Operators Caucus (TOC), the National Cable Television Association (NCTA), and the Community Antenna Television Association (CATA).

[5] *See* 47 CFR §§76.57-76.61.

[6] There are separate versions of the must carry rules for cable systems operating: 1) outside all television markets; 2) in smaller television markets; and 3) in major television markets. *See* 47 CFR §§76.57, 76.59, and 76.61.

[7] *See* "Suspended Enforcement of Certain Sections of 47 CFR Part 76," Public Notice, released September 10, 1985, 50 FR 38003.

[8] *See Frontier Broadcasting Company v. Collier*, 24 FCC 251 (1958); *recon. denied* in conjunction with *Report and Order* in Docket No. 12443, 26 FCC 403, 428 (1959).

[9] *See Carter Mountain Transmission Corp.*, Docket No. 12931, 32 FCC 459 (1962), aff'd 321 F.2d 359 (D. C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

[10] *See First Report and Order* in Docket Nos. 14895 and 15233, 38 FCC 683 (1965).

[11] *See Second Report and Order* in Docket Nos. 14895 and 15233, 2 FCC 2d 725 (1966).

[12] *See Cable Television Report and Order*, Docket Nos. 18397, *et al.*, 36 FCC 2d 143 (1972). Many of the provisions of the *Cable Television Report and Order*, particularly those pertaining to carriage of distant signals, have now been eliminated. *See e.g., Report and Order* in Docket No. 19859, 57 FCC 2d 68 (1976) [permitting additional carriage of network news programs]; *Report and Order* in Docket No. 20681, 60 FCC 2d 672 (1976), and *Report and Order* in Docket No. 21002, 66 FCC 2d 380 (1977) [modifying and deleting requirements for local cable franchises]; *Report and Order* in CT Docket No. 78-206, 69 FCC 2d 697 (1978) [eliminating certificate of compliance procedures]; *Report and* Ord er in Docket Nos. 20988 and 21284, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York v. FCC*, 652 F.2d 1140 (2d Cir.), *cert. denied*, 454 U.S. 1143 (1981) [eliminating distant signal and syndicated exclusivity rules].

[13] *See First Report and Order, supra at 697.*

[14] Id. at 699.

[15] Id. at 685-699.

[16] Id. at 699.

[17] Id.

[18] Id. at 702-703; *see also Second Report and Order, supra at 737.*

[19] *See First Report and Order, supra at 702.*

[20] Id. at 705.

[21] Id. at 701.

[22] Id. at 710.

[23] Id. at 710-711.

[24] Id. at 711.

[25] *See Second Report and Order, supra at 744.*

[26] *See Economic Inquiry Report,* Docket No. 21284, 71 FCC 2d 645-646 (1979); *see also Report and Order* in Docket No. 20988, *supra* at 686.

[27] *See Economic Inquiry Report, supra at 646.*

[28] *See Cable Television Report and Order, supra.*

[29] Cable Communications Policy Act of 1984, Pub.L. No. 98-549, §1 *et seq.*, 98 Stat. 2779 (1984).

[30] 47 U.S.C. §521 *et seq.*

[31] *Quincy, supra.* The *Quincy* decision arose from the court's consolidation of two separate cases, *Quincy Cable TV, Inc. v. FCC and Turner Broadcasting System, Inc. v. FCC.* In the former, a cable system challenged a Commission order requiring it to carry certain stations under the must carry rules. In the latter, TBS appealed the Commission's dismissal of its petition for rule making to eliminate the must carry rules.

[32] Id. at 1452.

[33] Id. at 1453.

[34] *See e.g., Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969).

[35] *Quincy, supra at 1444.*

[36] Id. at 1449.

[37] Id. at 1450.

[38] 391 U.S. 367 (1968).

[39] 418 U.S. 241 (1974). *Miami Herald* involved a newspaper, and the First Amendment standards explicated therein are generally applied to the print media. The *Quincy court* explained that "for cable, no less than for other media, the First Amendment draws a distinction between 'incidental' burdens on speech -- regulations that evince a governmental interest unrelated to the suppression or protection of a particular set of ideas -- and restrictions that are intended to curtail expression." *Quincy, supra* at 1450, *quoting Home Box Office, Inc. v. FCC,* 567 F. 2d 9 (D.C. Cir.) *(percuriam), cert denied,* 434 U.S. 829 (1977).

[40] *Quincy, supra at 1453.*

[41] Id at 1454.

[42] Id. The court stated that if *Miami Herald* is the appropriate standard for constitutional scrutiny of the must carry rules, it would be unnecessary to test them against any other standard. The court also stated that "once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic unity for purposes of the First Amendment, the analogy to more traditional media is compelling." Id. at 1450.

[43] Id at 1451, *quoting United States v. O'Brien, supra at 377.* (ellipses in original.)

[44] *Quincy, supra at 1454.*

[45] Id.

[46] Id. at 1460. Additionally, the court noted that the rules apply with equal force to all cable systems and do not distinguish among cable systems based on their channel capacity or the extent to which they are saturated with must carry signals. Id. at 1462, n. 55.

[47] Id. at 1434.

[48] Id. at 1463.

[49] NAB was joined in its petition by the Association of Maximum Service Telecasters, the Station Representatives Association, the American Broadcasting Companies, Inc., CBS Inc., the National Broadcasting Company, Inc., the ABC Affiliates Association, the Spanish International Communications Corporation, Bahia de San Francisco Television Company, The Seven Hills Television Company, and the National Religious Broadcasters. CPB was joined in its petition by the National Association of Public Television Stations and the Public Broadcasting Service.

[50] A list of parties filing comments in response to the *Notice* is provided in Appendix A.

[51] *See footnote 4, supra.*

[52] A list of the parties filing responses to the industry agreement is provided in Appendix A.

[53] Specific plans and proposals for resolving the must carry matter were submitted to the Commission by Senator John C. Danforth, Chairman of the Senate Committee on Commerce, Science, and Transportation and Congressman Timothy Wirth, Chairman of the House Subcommittee on Telecommunications, Consumer Protection, and Finance.

[54] *See Report and Order* in MM Docket No. 83-670, 49 FR 33588.

[55] 391 U.S. 367 (1968).

[56] *See Report and Order* in MM Docket No. 83-670, *supra.*

[57] *See Report and Order* in MM Docket No. 19142, 96 FCC 2d 634 (1984), *aff'd sub nom, Action for Children's Television v. FCC,* 756 F.2d 899 (D.C. Cir. 1985).

[58] The City of Boston comments that cable carriage of the eleven local stations in the Boston area would provide in excess of 100 hours of local news and public affairs programming each week to cable subscribers.

[59] In its reply comments, CPB explains that multiple public stations in a market are not like duplicating commercial network affiliates. CPB states that public stations do not provide duplicated programming, but offer unique and distinct services to discrete audiences or offer viewers programs at different times.

[60] Nine television stations filed comments claiming that they are especially at risk in the absence of must carry rules. In its comments, INTV reports seven additional stations that claim to be threatened.

[61] *See* footnote 18, *supra.*

[62] "The A/B Switch: A Non-solution to Must Carry", INTV, cited in "Broadcasting", June 23, 1986, at 75-76.

[63] The ELRA study's principal findings include:

1) One percent of cable subscribers now have an outdoor antenna and an A/B switch;

2) Two percent of cable homes use rooftop antennas in connection with their cabled television receivers;

3) Over half of cable households have never had an outdoor antenna;

4) About half of the cable subscribers who ever had a rooftop antenna have taken it down;

5) Over forty percent of those who removed their antennas took them down because of their belief that cable service made

them unnecessary;
6) Almost one-third of cable subscribers were told by their cable system that they would no longer need a rooftop antenna; and,
7) Almost two-thirds of all cable subscribers said that better reception was a principal reason for subscribing to cable service.

[64] The ELRA study indicated that one-third of cable homes now have VCRs.

[65] Cable service generally connects to the VHF antenna terminals of TV receivers and, therefore, does not affect the use of the receivers' separate UHF antenna terminals. Thus, reception of UHF signals generally does not require use of an A/B switch, except in those cases where the receiver's cable ready feature operates in a manner such that its use disables the UHF antenna input terminal.

[66] For example, in its comments, NCTA cites a recent survey that indicates that broadcast stations, "excluding superstations," received more than 70 percent of the audience in cable households during the first nine months of 1985. Cable Television Advertising Bureau, *Cable Market Update*, 1985.

[67] For example, TBS notes that despite the publicity given to a few new cable systems with 50-100 channels, over 38.7 percent of all systems have 20 or fewer channels and 12.4 percent of all systems have 12 or fewer channels.

[68] Copyright Revision Act of 1976, 17 U.S.C. §111.

[69] Section 111(f) states in pertinent part: "The local service area of a primary transmitter in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976."

[70] *See Quincy*, *supra* at 1454 n. 42.

[71] Mr. Leghorn is a cable system owner and a former member of the board of directors of the National Cable Television Association.

[72] The agreement defines "useable activated channels" as "those engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, less channels reserved against interference with aeronautical frequencies."

[73] The fifty mile requirement is computed by measuring from the principal cable headend to the reference point of the station's city of license.

[74] The industry agreement utilizes different viewership criteria for new and existing stations. To qualify for mandatory carriage status, an existing station is required to demonstrate, using independent professional audience surveys, that it has achieved the requisite audience share for the previous television survey season. This showing is made on the basis of audience surveys undertaken during a separate consecutive four-week period in each of the four quarters of that season (i.e., April-June, July-September, October-December, and January-March). A new station, in contrast, "may satisfy the viewership test by presenting survey evidence gathered by a recognized rating service" and will retain its status as a qualified station until survey data for its first full television survey season -- which extends from April until March -- are available.

[75] Low power TV stations, TV translators, and TV boosters do not qualify for mandatory carriage. In addition, television stations licensed by foreign governments are not entitled to mandatory carriage.

[76] In resolving disputes over the rules, the industry proposal specifies that the burden of demonstrating a right to mandatory carriage will be borne by the broadcast station.

[77] According to Senator Danforth, permitting local stations to choose the method of audience measurement would minimize the ability of cable systems to drop stations that have significant viewing shares in cable homes, but have insignificant shares in noncable homes due to reception difficulties.

[78] Like the industry agreement, this proposal would not require carriage of duplicated public stations. A station would be considered nonduplicated if 50 percent or less of its average program week consists of the broadcasting of the same episode of a program by another local station within the same week, comparing schedules of the stations for the same seven day period, sign-on to sign-off.

[79] Satellite program services have increased rapidly since the development of satellite distribution technology. Today, at least 57 video, 11 text, and 11 audio channel satellite-delivered program services are operating. National Cable Television Association, *Satellite Services Report*, February 1986. The most widely available satellite programming services, such as CNN, CBN Cable Network, ESPN, SIN Television Network, and USA Network, reach at least 30 million television households each. *Cablevision*, March 31, 1986, at 40.

[80] 47 U.S.C. §§151 and 303(g).

[81] 47 U.S.C. §521.

[82] *See Sixth Report and Order on Television Assignments*, Docket Nos. 8736 and 8975, adopted April 11, 1952, 41 FCC 148.

[83] *See* Pub. L. No. 87-447, 76 Stat. 64 (1962); *see also* 47 U.S.C. §§396(a)(5) and (6).

[84] *See* Pub. L. No. 90-129, 81 Stat. 365 (1967); *see also* 47 U.S.C. §§396(a)(5) and (6). Congress affirmed and strengthened the goal of extending public television to as many people as possible in the Public Broadcasting Act of 1967. There, Congress stated that "it furthers the general welfare to encourage public broadcasting services." and that "it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will effectively make public broadcasting services available to all of the citizens of the United States" *See* Pub. L. No. 90-129, 81 Stat. 365 (1967); *see also* 47 U.S.C. §§396(a)(5) and (6).

[85] This is not to say that the regulatory plan we are adopting does not have the ancillary effect of furthering some of those interests, e.g., Section 307(b).

[86] *See First Report and Order*, *supra*, at 699.

[87] *See Quincy*, *supra* at 1453. In recent years, lower federal courts have also recognized that cable operators engage in activities protected by the First Amendment and some have subjected our cable rules to more rigorous First Amendment analysis. *See* e.g., *Tele - Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336 (D.C. Cir. 1985); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052-1057 (8th Cir. 1978), *aff'd* on other grounds, 440 U.S. 680 (1979).

[88] Cable ready receivers generally disable the UHF antenna terminals when used in the cable ready mode. Use of UHF antennas with such receivers would require the viewer to use the mode switch on the receiver to alternate between cable service and off-the-air UHF reception.

[89] 47 U.S.C. §705.

[90] Since the Commission deregulated receive-only earth stations in 1979, sales of HSDs have risen dramatically. An industry source indicates that 1,345,000 HSDs were in use by the

end of 1985, representing 1.6 percent of television households in the United States. First Communications Group, *The Home Satellite State of the Industry Report, January, 1986, at 7, 15.* The HSD industry is currently facing a period of some uncertainty as many satellite programmers are implementing scrambling systems. The future of this industry and the ability of noncable subscribers to access satellite programming will depend in large part on the decisions of these programmers with respect to marketing their scrambled services.

[91] 47 U.S.C. §307(b).

[92] In this regard, the interim must carry regulations are not intended as a mechanism to extend signals beyond a station's service contour or into areas where the signal would not otherwise be available off-the-air.

[93] *See* Appendix B.

[94] In cases where the cable subscriber has an equivalent input selector device, for example through a former purchase or as a built-in feature of his/her television receiver, the cable system will not be required to provide another switch.

[95] This requirement is subject to the above exception for cases where subscribers are already equipped with input selector switches.

[96] *See* 47 U.S.C. §532(b)(5)(A).

[97] Cable carriage of these outlets and any other broadcast stations that do not qualify for carriage under these rules will continue to be permitted at the discretion of the cable operator but will not count towards meeting a cable system's mandatory signal carriage obligations.

[98] *See* 47 CFR §76.53. We also note that there will be no special provisions in the interim must carry rules for hyphenated markets, as defined in Section 76.51 of our rules. *See* 47 CFR §76.51.

[99] "Share of total viewing hours" means the total hours that noncable television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of noncable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total noncable television households in the survey area. These definitions are consistent with those used for determining whether a station is significantly viewed. *See* 47 CFR §76.5(k).

[100] A station's one year exemption from the viewing standard will begin on the date it begins operation under program test authority (PTA). Also, stations that have gone off-the-air and come back on at some time after the first calendar year from their initial commencement of operation will not qualify as new stations for purposes of these rules.

[101] The rating services occasionally split large counties where there are viewing differences from one part of county to another. Also some cities that are not located in counties are reported separately. Where a station qualifies for carriage based on surveys for a geographic unit other than an entire county, its carriage rights will be limited accordingly.

[102] *See* §76.54(d). The principal difference between the surveys required here and those used to determine significant viewing status is that must carry qualification will be based on four 4-week survey periods instead of three 4-week audience periods.

[103] We note that it is possible for a new station to have been on-the-air more than 12 months and less than one complete television survey season.

[104] The required survey is similar to that prescribed in Section 76.54(b) for determining whether a station is significantly viewed. The two procedures differ in that a survey for qualifying for must carry status is a county based, rather than a community based study, and there are no limits on the choice of two-week survey period.

[105] This definition is generally comparable to a level 2 grade signal as rated by the TASO Committee. *See* Report of the Television Allocations Study Organization, *Engineering Aspects of Television Allocations*, March 16, 1959, at 448, 453. *See also* Gordon L. Fredendall and William L. Behrend, "Picture Quality -- Procedures for Evaluating Subjective Effects of Interference," *Proceedings of the IRE*, Vol. 48, No. 6, at 1030-1034.

[106] These values may be considered comparable to the level 2 TASO picture quality standard.

[107] We are not establishing a specific technical requirement to permit greater flexibility among the parties to determine good picture quality.

[108] For example, if a cable system has 25 usable activated channels, it must devote a maximum of 7 channels to stations that qualify for must carry rights. If 2 ABC affiliates, 1 CBS affiliate, 1 NBC station, 2 independents, and 1 PBS station qualify for carriage on this system, then the cable operator would be able to decide whether to carry one or both of the ABC affiliates and must carry each of the other qualified stations.

[109] As commenters have indicated, affiliates of noncommercial educational networks rarely broadcast substantial portions of their programming simultaneously. Therefore, the carriage of more than one noncommercial educational station affiliated with the same network generally adds to viewer choices. However, the Commission will consider granting exemptions to this requirement in those situations where it can be shown that there is a consistently high degree of simultaneous program duplication.

[110] Similarly, a cable system will not have to carry two or more translator or satellite stations that duplicate the same parent station.

[111] However, the rules relating to the requirement that programs on distant signals be carried in full, but that entire signals need not be carried in full, were not the subject of this proceedng and, therefore, remain unchanged. *See* 47 CFR 76.55(b). This section of the rules is being recodified as §76.62(a), pursuant to our decision herein.

[112] *See* 47 CFR 76.92-99.

[113] This prohibition does not apply to nonqualified stations or those otherwise qualified stations that are carried but whose carriage does not serve to fulfill must carry obligations because there are an excess number of qualified signals in the market.

[114] If a new station is involved, the 12-month exemption from the audience share requirement will not run during the period of dispute resolution if the station is not being carried.

[115] In light of both our prior determination that services on the VBI and the aural baseband are secondary in nature and our recognition of cable operators' First Amendment rights, we believe it is not appropriate to require carriage of these signals. *See Report and Order* in MM Docket 84-168, 50 FR 4658 at para. 10 (1985); *see also Second* R eport and Ord er in Docket No. 21233, 49 FR 18100 at para. 25 (1984).

[116] All cable systems offering more than 60 channels of service use dual cable operation.

[117] Converter devices that provide for remote switching between "A" and "B" cables are now being manufactured by Zenith Radio Corp. and Jerrold Division, General Instruments Corp.

[118] "1985 Television and Cable Factbook," Cable and Services Volume No. 53, at 1385.

[119] In this respect, we recognize that the costs of the input selector switches that cable systems will be required to provide under the new rules are likely to be borne ultimately by cable subscribers through higher service rates.

[120] *See* Notice at footnote 6. .

[121] *City of Los Angeles and Department of Water and Power v. Preferred Communications, Inc.* (*Preferred*), 106 S.Ct. 2034, 2035 (1986).

[122] While the issue has been raised by the parties in several cases, the Supreme Court has never resolved the issue concerning the applicable First Amendment standard governing cable television. *See Preferred*, *id.* ; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Midwest Video Corp. v. FCC*, 440 U.S. 689, 709 n.19 (1979).

[123] Certain parties in this proceeding have urged the Commission to employ a functional analysis of the particular aspects of cable service in assessing the First Amendment implications arising from reimposition of a mandatory carriage requirement. While acknowledging that the program origination functions of cable operators qualify for full First Amendment protection, these parties argue that the First Amendment rights of cable operators, in performing the function of retransmitting local broadcast signals, are either minimal or nonexistent. *See, e. g.*, Comments of National Broadcasting Co. (filed Jan. 29, 1986). The United States Supreme Court recently stated, however, that cable operators "through original programming or by exercising editorial discretion over which stations to include in its repertoire . . . implicate first amendment interests." *Preferred*, 106 S.Ct. at 2035. Thus, not only did the Court indicate that both the programming and retransmission functions of a cable operator are entitled to First Amendment protections, but in so stating the Court made no distinction as to the quantum of protection afforded to the operator on the basis of whether it performs an origination or retransmission function. *See also Omega Satellite Products Co. v. City of Indianapolis* (*Omega Satellite*), 694 F.2d 119, 127 (7th Cir. 1982) (cable system "engaged in the dissemination of speech within the meaning of the First Amendment, both by transmitting programs originated by television stations and cable television networks and by originating its own . . . programs."); *Tele - Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336-37 (D.C. Cir. 1985) ("Whether or not TCI [the cable operator] produces any original programming of its own, its activities of transmitting and packaging programming mandate that it receive First Amendment protection."); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 898 (W.D. Mo. 1985), *aff' d* 800 F.2d 711 (8th Cir. 1986).

[124] 694 F.2d 119 (7th Cir. 1982).

[125] *See, e. g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[126] *Omega Satellite*, 694 F.2d at 127.

[127] *Id.*

[128] 438 U.S. 726 (1978).

[129] *Omega Satellite*, 694 F.2d at 128.

[130] 660 F.2d 1370 (10th Cir. 1981), *cert. dism.* 456 U.S. 1001 (1982).

[131] 660 F.2d at 1377.

[132] While the Tenth Circuit explicitly determined that it was inappropriate to utilize the strict First Amendment standard of review governing the regulation of the press in cases involving cable regulation, it declined to address whether "the full panoply of principles governing the regulation of wireless broadcasters necessarily applies to cable operators." *Id.* at 1379.

[133] The Tenth Circuit was persuaded that two characteristics of cable television distinguished it from the print media. First, in contrast to the manner in which a newspaper disseminates its message, the court stated that:

> a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain.

Id. at 1377-78. Second, the court stated that "the physical and economic limitations on the number of cable systems that can practicably operate in a given geographic area" differentiate cable from the press. *Id.*

[134] *Id.* at 1379. Other federal courts have also adopted a lenient constitutional standard. In *Hopkinsville Cable TV v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982), a district court held that a cable system is a "natural monopoly" which justifies the award of an exclusive franchise by a municipality. *But cf. Carlson v. Village of Union City, Michigan*, 601 F. Supp. 801 (W.D. Mich. 1985), in which another district court in the Sixth Circuit applied the balancing test prescribed in *United States v. O' Brien* (*O'Brien*), 391 U.S. 367 (1968).

Perhaps the opinion applying the most lenient standard of review to cable regulation is *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968), in which the Eighth Circuit, expressly extending the "physical scarcity" rationale to cable television, explicitly applied the lenient broadcast standard in upholding the constitutionality of a number of cable regulations, including mandatory carriage rules. While the Eighth Circuit has never expressly repudiated *Black Hills Video*, nonetheless it is unclear that *Black Hills Video* continues to reflect the law in the circuit. In *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff' d on other grounds*, 440 U.S. 689 (1979), the Eighth Circuit virtually ignored its earlier decision, and in dicta, appeared to endorse a more stringent constitutional standard for cable television. In light of *Midwest Video*, at least one court has concluded that *Black Hills Video* "is a doubtful precedent today." *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985), *aff' d on other grounds sub nom. City of Los Angeles and Department of Water and Power v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986). Further, a district court in the Eighth Circuit has recently applied a standard of review which appears to be inconsistent with the 1968 *Black Hills Video* decision. *Central Telecommunications v. TCI Cablevision, Inc.*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff' d* 800 F.2d 711 (8th Cir. 1986).

[135] *Quincy, supra*, n.2.

[136] *Id.* at 1448.

[137] The United States Court of Appeals for the District of Columbia Circuit has consistently rejected the application of a broadcasting standard to cable television on the grounds that spectrum scarcity does not exist in the context of cable television. For example, nine years ago, in *Home Box Office, Inc. v. FCC*, 567 F.2d 944-45 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), the District of Columbia Circuit expressly stated that the traditional First Amendment standard applied to broadcasting services "cannot be directly applied to cable television since

an essential precondition of that theory -- physical interference and scarcity requiring an umpiring role for government -- is absent."

[138] *Quincy*, 768 F.2d at 1449.

[139] *Id.* at 1450.

[140] The court set forth three reasons for this conclusion. First, it expressed skepticism, as a factual matter, that cable operators are in an economic "position to exact monopolistic rents." *Id.* Second, it asserted that "the tendency toward monopoly, if present at all, may well be attributable more to governmental action -- particularly the municipal franchising process -- than to any 'natural' economic phenomenon." *Id.* Third, even assuming, *arguendo*, the existence of the "natural monopoly" characteristics of cable television, the court was unpersuaded that purely economic constraints on the number of voices available in a given community would justify the constraints upon First Amendment freedoms. *Id.*

[141] In this regard, the court stated that:

> [t]he potential for disruption inherent in stringing coaxial cables above city streets may well warrant some governmental regulation of the process of installing and maintaining the cable system. But hardly does it follow that such regulation could extend to controlling the nature of the programming that is conveyed over that system.

Quincy, 768 F.2d at 1449.

[142] *Supra* n.132.

[143] Because cable systems do not directly utilize the electromagnetic spectrum, the traditional justification for the application of a lower standard in evaluating the constitutionality of broadcast regulation -- spectrum scarcity -- simply does not apply to cable television. The three federal circuit courts addressing this issue in the past two years have employed a stricter First Amendment test in assessing the constitutionality of cable regulation. *Quincy*, *supra* ; *Preferred*, *supra*; *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985). Recent district court decisions have also enunciated constitutional tests which carefully scrutinize governmental actions affecting the First Amendment rights of cable operators. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). *See generally Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, *supra* n.101. *See Carlson v. Village of Union City, Michigan*, *supra n.132*.

[144] *Supra n.123.*

[145] Indeed, as the court in *Quincy* noted,

> [T]echnological advances may have rendered the "scarcity rationale" obsolete even for broadcasters. . . . [And while] [t]he Supreme Court recently suggested . . . that it was not prepared to reconsider its "long-standing approach" to the broadcast medium. . . . it made clear that [a] law . . . would receive far more exacting scrutiny if it were directed at non-broadcast speech.

Quincy, 768 F.2d at 1449, n.32 (citations omitted).

[146] As the District of Columbia Circuit recognized in *Quincy*, such a determination by itself "does not, of course, suggest that the First Amendment interposes an impermeable bulwark against any regulation."

Quincy, 768 F. 2d at 1450.

[147] *Supra n.132.*

[148] *See e.g. Miami Herald Publishing Co. v. Tornillo (Miami Herald)* 41 U.S. 241 (1974). As the court in *Quincy* stated, certain content-based regulations appear to be impermissible *per se:*

> [I]f *Miami Herald* supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end without any need for testing against the other *O'Brien* factors or applying any other form of interest balancing. In *Miami Herald* . . . [w]ithout so much as alluding to even the possibility of a subordinating governmental interest, the Court invalidated the statute.

Quincy, 768 F.2d at 1453 (footnotes omitted). Other Supreme Court cases, however, have indicated that content-based restrictions will be measured under a compelling state interest standard. *See, e.g., Pacific Gas and Electric Co. v. Public Utilities Commission of California (Pacific Gas)*, 106 S.Ct. 903 (1986).

[149] The Court concluded that the regulation was designed to prevent the secondary effects of adult theatres on the surrounding community; namely, to prevent crime, protect the city's retail trade, maintain property values,and generally preserve the quality of the city's neighborhoods. Id. at 4162.

[150] Like the court in *Quincy*, we recognize that the same *O'Brien* test would apply to newspapers in assessing the constitutionality of a content-neutral rule. See Quincy, *supra*, at 1452. Thus, in applying the Renton test for determining content-neutral status in this proceeding, we assume that cable operators have the same full First Amendment rights as newspapers.

[151] In *Pacific Gas*, also decided after *Quincy*, a plurality of the Court struck down a utilities commission order that required a utility to include in its billing envelopes messages by a consumer organization. Four members of the Court agreed that the order burdened speech in the same manner as the right of reply statute in Tornillo.

[152] *See para. 197, infra.* In Renton, the Court observed that content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest "and do not unreasonably limit alternative avenues of communication." Id. at 4162.Although the Renton zoning ordinance significantly limited the locations in which adult theaters could be operated within the city, see dissenting opinion of Justice Brennan, the majority concluded that there was still a"reasonable opportunity" to own and operate an adult theater. Id. at 4163.Similarly, by limiting the number of stations that a cable system must carry, the interim regulations are designed to provide cable programmers a"reasonable opportunity" for carriage of their signals on cable systems.

[153] We recognize, of course, that to the extent the interim rules raise novel constitutional issues, a reviewing court may ultimately determine that some departure from past precedent is warranted. Any such extensions of the law, however, are more appropriately made by a reviewing court.

[154] *Quincy*, 768 F.2d at 1451, quoting O'Brien, 391 U.S. at 377 (ellipses in original). In establishing this standard, the Supreme Court, in addition to the material quoted above, specified that the governmental regulation must be "within the constitutional power of the Government" (O'Brien, 391 U.S. at 377) and that the governmental interest [be] . . . unrelated to the suppression of free expression." Id.

[155] Quincy, 768 F.2d at 1454.

[156] Id. at 1454, 1457.

[157] Id at 11457

[158] The Supreme Court reversed the lower court, inter alia, for failing to provide sufficient deference to the articulated governmental interest. The Court noted that the Court of Appeals had found the "city's justifications for the ordinance" to be "'conclusory and speculative'" on the grounds that"the Renton ordinance was enacted without the benefit of studies specifically relating to 'the particular problems or needs of Renton.'" The Court concluded that this reasoning "imposed on the city an unnecessarily rigid burden of proof." Renton, 106 S.Ct. at 930, quoting Renton v. Playtime Theatres, Inc., 748 F.2d 527, 537 (9th Cir. 1984).

[159] As discussed above, *infra*, existing empirical data concerning the actual effects of deletion of the must carry rules on signal carriage is sparse. Moreover, given the rapidly evolving nature of the cable industry and changing competitive incentives resulting from the continuing development of satellite programming services carried by cable systems and other factors, *see* para. 39 *supra*, it is not clear that timely empirical studies could be carried out that would provide an accurate forecast of the effects of deleting the rules. The evidence does demonstrate, however, that a substantial number of cable subscribers have not maintained independent access to off-the-air reception and, therefore, would not currently be able to view stations if they were dropped by cable systems. Given the substantial federal interests at stake and the potential for cable systems to delete competitive broadcast services, we find that the record justifies continuance of must carry obligations as a transitional measure.

[160] As noted above, with the exception for noncommercial broadcast stations, the rule which we adopt today exempts cable systems with less than20 activated channels from the mandatory carriage requirement. Because small cable systems have fewer channels upon which to disseminate information, we believe that even a limited mandatory carriage requirement for commercial stations would have a significant impact upon these systems' ability to choose programming for their subscribers. This exemption,therefore, reflects our view that although our interest in preserving the programming choices afforded by local broadcasting is substantial, it must be balanced against the similarly substantial First Amendment rights of cable. We have concluded that the former must give way to the latter where cable has 20 or fewer channels. We note that the Supreme Court, in applying the O'Brien standard, recently stated that:

> [T]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests.

United States v. Albertini (Albertini), 105 S.Ct. 2897, 2907 (1985).

[161] *Clark v. Community for Creative Non-Violence (Clark)*, 468 U.S. 288(1984); *Albertini, supra*. In *Clark*, the Supreme Court upheld the constitutionality of a regulation prohibiting camping in Lafayette Park against the contention that the regulation violated the First Amendment rights of demonstrators protesting the plight of the homeless. The Court rejected the argument that the regulation was over broad because the Park Service, short of an absolute prohibition on sleeping, could have adequately protected park lands by limiting the size, duration or frequency of the demonstration. In finding that the regulation comported with the least restrictive means criterion, the Court stated that the amount of protection which the parks require is a matter of dispute and that O'Brien:

> [does not] assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Clark, 468 U.S. 299 (footnote omitted). *See generally Renton, 106 S.Ct. at 931.*

[162] *Albertini*, 105 S. Ct. at 2907 (citations omitted).

[163] *Quincy*, 768 F.2d at 1459, *quoting White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1519 (D.C. Cir. 1984).

[164] Id.

[165] Id. at 1459.

[166] Id. at 1462, n.55.

[167] Id.

[168] Id. at 1460.

[169] Id. at 1460 (emphasis in original).

[170] We note that the court, in *Quincy*, criticized the former must carry rules for providing "indiscriminate protection [for] every broadcaster regardless of whether or to what degree the affected cable system poses a threat to its economic well-being." Id. at 1461. As noted above, however,the new rules do not accord blanket protection for all local stations and the economic effect of the rules on any individual station is not our primary concern. On the contrary, a requirement that failing stations be carried might be inimical to the public interest, in that we might well be requiring cable systems to carry broadcast stations the public did not want to watch, thereby preventing the cable system from offering a program service the viewers preferred. This would run directly counter to the *Quincy* court's concern that our former must carry rules were unresponsive to consumer preference.

[171] 47 U.S.C. § 544.

[172] 47 U.S.C. § 326.

[173] Section 624(b) of the Cable Act provides, in part: "In the case of any franchise granted after the effective date of this title, the franchising authority, to the extent related to the establishment or operation of a cable system -- (1) in its request for proposals for a franchise . . .may not establish requirements for video programming or other information services"

[174] H.R. Rep. 934, 98th Cong., 2d Sess. 69 (1984).

[175] Section 624(f)(1) provides that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title."Section 624(f)(2) provides that paragraph (1) shall not apply to any Commission rule either in effect on September 21, 1983, or amended after such date if the amendment is not inconsistent with the express provisions of the Cable Act.

[176] Section 326 of the Communications Act withholds from the Commission"the power of censorship over the radio communications or signals transmitted by any radio stations" and prohibits it from promulgating any"regulation or condition.which shall interfere with the right of free speech." 47 U.S.C. Section 326.

[177] *Loretto v. Teleprompter Manhattan CATV Corp. (Loretto)*, 458 U.S. 419,441 (1982).

[178] H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984).

[179] House Report, *supra* at 70.

[180] *Trinity Methodist Church South v. Federal Radio Commission*, 62 F.2d850, 853 (D.C. Cir. 1932) (citations omitted). See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-123, (1978), which also concludes that regulation of use

of private property which impairs its value is not a taking if it serves a substantial public purpose and does not prevent a reasonable use of the property.

[181] Here, it is clear that our interim rules permit reasonable use of cable facilities, *see* discussion *supra* at paras. 197-201; moreover, given the long history of federal and state regulation of cable since the service's inception, the interim rules plainly do not have a significant impact on investor expectations. See Penn Central, supra, at 124-25. *Loretto, supra,* is not to the contrary. That case involved a permanent, physical occupation of property, a factor that is not present here. The Loretto Court also clearly distinguished those cases in which there was merely a restraint on the owner's use of property requiring an ad hoc analysis, as in *Penn Central, supra,* to determine if there is a compensable taking. *See also MacDonald, Sommer & Frates v. Yolo County,* 106 S. Ct. 2561, 2566 (1986),reiterating that the Court has no "set formula to determine where regulation ends and taking begins." (Citation omitted.)

[182] The only federal appeals court to directly confront the Fifth Amendment issue presented by must carry rules stated that because the rules are reasonably related to the objectives of the Communications Act, they do not constitute a taking in violation of the Fifth Amendment. See Black Hills Video Corporation v. FCC, supra. See also Quincy at 1447, n.27, wherein the court declined to address the petitioner's Fifth Amendment contentions.).

[183] 106 S. Ct. 2034 (1986).

APPENDIX A

List of Commenters
Initial Comments

1. WLIG-TV, Inc.
2. Providence Journal Company
3. Ponderosa Television, Inc.
4. USA Network
5. Meridian Communications Corporation
6. Centel Cable Television
7. Joint Comments of 89 Cable System Operators
8. Community Antenna Television Association, Inc.
9. Family TV Associates
10. Community TV Corp., Hudson Cablevision Corp., Lakes Cablevision Corp.,

Milford Cablevision Corp., and Souhegan Cablevision Corp.

11. Press Broadcasting Company
12. Grace Cathedral, Incorporated
13. Maryland-District of Columbia-Delaware Broadcasters Association, Inc.
14. Connecticut Cable Television Association, Inc.
15. National Cable Satellite Corporation - C-SPAN
16. Spanish International Communications Corporation, Bahia de San Francisco Television Company, The Seven Hills Television Company
17. New Jersey Public Broadcasting Authority
18. Donrey Media Group
19. Eternal Word Television Network, Catholic Cable Network
20. United Television, Inc.
21. National Telecommunications and Information Administration
22. New York State Commission on Cable Television
23. Channel 66 Associates Limited Partnership
24. National Association of State Cable Agencies
25. Financial News Network Inc.
26. United States Department of Justice
27. North Carolina Association of Broadcasters
28. ABC Television Affiliates Association
29. Taft Broadcasting Company
30. National Telephone Cooperative Association
31. Tele-Communications, Inc.
32. Association of National Advertisers, Inc.
33. Office of Communication of the United Church of Christ, Henry Geller and Donna Lampert
34. National Association of Broadcasters
35. Western Communications, Inc. and Gill Industries
36. Pennsylvania Pay Television, Inc.
37. TVX Broadcast Group, Inc.
38. Cape Video Network, Limited Partnership
39. State Public Broadcasting Networks of Alabama, Alaska, Connecticut,

Georgia, Iowa, Kentucky, Louisiana, Maryland, Mississippi, New Hampshire,

New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Virgin

Islands, West Virginia, and Wisconsin

40. Maranatha Broadcasting Company, Inc.

41. Fleischman and Walsh on behalf of Adelphia Communications Corporation, Arizona Cable Television Association, Bucks County Cablevision, Coaxial Communications, The Essex Companies, Falcon Cablevision, Hauser Communications, Inc., Helicon Corporation, Maine Cable Company, McCaw Communications Companies, Inc., Mid-America Cable Television Association, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications Inc., Vision Cable Communications, Inc., Whitcom Investment Company, Whitney & Company, Inc., and W.W. Communications, Inc. (Nineteen Cable Operators)

42. Richard S. Leghorn

43. National Cable Television Association, Inc.

44. Association of Independent Television Stations, Inc.

45. Buffalo Broadcasting Company, Inc.

46. American Television and Communications Corporation

47. Black Entertainment Television

48. CBS Inc.

49. Station Representatives Association, Inc.

50. Corporation for Public Broadcasting, the National Association of Public

Television Stations, and the Public Broadcasting Service

51. Heritage Communications, Inc.

52. Astroline Communications Company Limited Partnership, Four Star

Broadcasting, Inc., Amistad Communications of the Southwest, Kyles

Broadcasting, Ltd., Mandeville Communications Company of New Orleans and Tampa Bay Broadcasting, Ltd.

53. The City of New York Municipal Broadcasting System

54. The City of Boston

55. American Cable Publishers Institute, Inc.

56. Howard University, The National Association of Black-Owned Broadcasters, The National Bar Association and the National Conference of Black Lawyers Communications Task Force

57. City of New York

58. Alaska Broadcasters Association, Bonneville International Corporation KIRO, Inc., Maine Radio and Television Company, WLBZ TV, Inc., Quincy Broadcasting Company, KTTC Television, Inc., WVVA Television, Inc., and WSJV Television, Inc.

59. Grant Broadcasting System, Inc.

60. Smaller Market UHF Television Stations Group

61. KWTX Broadcasting Co., Inc., Texoma Broadcasters, Inc., Brazos Broadcasters, Inc.

62. California Cable Television Association

63. Television Operators Caucus, Inc.

64. National Broadcasting Company, Inc.

65. Turner Broadcasting System, Inc.

66. Cosmos Broadcasting Corporation and WPNI Television Company, Inc.

67. Telepictures Corporation

68. Tulsa 23.

69. United States Catholic Conference

70. Tribune Broadcasting Company

71. Gateway Communications, Inc.

72. The Association of Maximum Service Telecasters

73. North Carolina CATV Association

74. Seattle Television Limited Partnership

75. Association of Program Distributors

76. Studioline Cable Stereo Network/Studioline Corporation of America

77. KMSS-TV, Shreveport, Louisiana

78. Malrite Communications Group, Inc.

79. Motion Picture Association of America, Inc.

80. NATPE International

81. ATV Broadcast Consulting Inc.

82. Gary L. Christensen

83. Lincoln Broadcasting Company

84. Broadcast-Cable Associates

85. KQTV Television

86. W-TWO Television Center

Reply Comments

1. National Coalition For Minority Broadcasting

2. Heritage Communications, Inc.

3. Gary L. Christensen

4. Bureaus of Competition, Economics and Consumer Protection of the Federal Trade Commission

5. Richard S. Leghorn

6. American Communications and Television, Inc.

7. ABC Television Affiliates Association

8. Corporation For Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service

9. Summit Radio Corporation

10. Astroline Communications Company Limited Partnership, Four Star Broadcasting, Inc., Amistad Communications of the Southwest, Kyles Broadcasting, Ltd., Mandeville Communications Company of New Orleans and Tampa Bay Broadcasting, Ltd.

11. Financial News Network Inc.

12. New Jersey Public Broadcasting Authority

13. California Broadcasting Association

14. William B. Smullin

15. Joint Reply Comments of 89 Cable System Operators

16. Donrey Media Group

17. Great Trails Broadcasting Corp.

18. Bloomington Comco, Inc. and Gerald J. Robinson

19. Spanish International Communications Corporation, Bahia De San Francisco Television Company and The Seven Hills Television Company

20. National Cable Television Association, Community Antenna Television Association, National Association of Broadcasters, Television Operators Caucus and Association of Independent Television Stations, Inc.

21. American Television and Communications Corporation

22. Grace Cathedral, Incorporated

23. National Telephone Cooperative Association

24. Office of Communication of the United Church of Christ, Henry Geller and Donna Lampert
25. City of New York
26. National Black Media Coalition
27. Cablevision Systems Corporation
28. Western Communications Inc.

Comments on the Industry Agreement

1. Malrite Communications Group, Inc.
2. McGraw-Hill Broadcasting Co., Inc., The New York Times Co. and Desert Empire TV Corp.
3. Maryland Public Broadcasting Commission
4. Community Antenna Television Association
5. National Coalition for Minority Broadcasters
6. Maranatha Broadcasting Company, Inc.
7. City of New York
8. WBNS-TV, Inc. and VideoIndiana Inc.
9. Sunshine Television Inc.
10. Carolina Christian Broadcasting, Inc.
11. WLIG-TV, Inc.
12. Fisher Broadcasting, Inc.
13. Montana Television Network
14. Providence Journal Company
15. WTZA-TV Associates
16. Meridian Communications Corporation
17. Corporation for Public Broadcasting, the National Association of Public Television Stations, and the Public Broadcasting Service
18. Jim Francis
19. Grace Cathedral, Incorporated
20. Howard University, The National Association of Black-Owned Broadcasters, The National Bar Association and The National Conference of Black Lawyers Communications Task Force
21. American Cable Publishers Institute, Inc.
22. Robert Schultz, President, VideoProbeIndex, Inc.
23. St. Charles CATV Inc. and Chasco Cablevision, Ltd.
24. KUTV, Inc. and Kansas State Network, Inc.
25. Duhamel Broadcasting Enterprises
26. Turner Broadcasting System, Inc.
27. Richard S. Leghorn
28. The Frontier Broadcasting Companies
29. Fargo Broadcasting Corp.
30. United States Department of Justice
31. Cablevision Systems Corporation
32. Summit Radio Corporation
33. Channel 17 Associates, Ltd.
34. National Association of Broadcasters
35. WNJU-TV Broadcasting Corporation
36. Gill Industries, Inc.
37. ABC Television Affiliates Association
38. Alison Greene, Loyola Law Review
39. United States Catholic Conference
40. National Cable Television Association, Inc.
41. Adelphia Communications Corporation, Arizona Cable Television Association, Bucks County Cablevision, Coaxial Communications, The Essex Companies, Falcon Cablevision, Hauser Communications, Inc., Helicon Corporation, Maine Cable Company, McCaw Communications Companies, Inc., Mid-America Cable Television Association, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications, Inc., Vision Cable Communications, Inc., Whitcom Investment Company, Whitney & Company, Inc., and W.W. Communications, Inc. (Nineteen Cable Operators)
42. Metropolitan Board of Education, Long Island Educational Television Council, Metropolitan Pittsburgh Public Broadcasting Inc., and Santa Clara Board of Education
43. National Independent Television Committee
44. Television Operators Caucus, Inc.
45. Canadian Broadcasting Corporation
46. Association of Independent Television Stations, Inc.
47. Allen Broadcasting Corporation
48. Capital Cities/ABC, Inc.
49. WFLI, Inc.
50. Bloomington Comco Inc. and Gerald J. Robinson
51. City of Boston
52. Tribune Broadcasting Company
53. CBS Inc.
54. NATPE International
55. Ohio Educational Broadcasting Network Commission
56. Motion Pictures Association of America, Inc.
57. Organization for the Protection and Advancement of Small Telephone Companies
58. Heritage Communications, Inc.
59. Grant Broadcasting System, Inc.
60. Spanish International Communications Corporation, Bahia de San Francisco Television Company, and The Seven Hills Television Company
61. National Telecommunications and Information Administration
62. California Cable Television Association
63. KTUH, Inc.
64. Ninety-Seven Television Stations

Appendix B

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, and 601.

2. Section 76.5 is amended by revising paragraphs (d) and (j) and adding new paragraphs (jj), (kk), (ll), and (mm) to read as follows:

§76.5 Definitions.

* * * * *

(d) *Qualified television station.* (1) Any television broadcast station, as defined in §76.5(b), that with respect to a particular cable system:

(i) Is licensed to a community whose reference point, as defined in §76.53, is within 50 miles of the principal headend of the cable system; and

(ii) If a commercial station, receives an average share of total viewing hours of at least 2 percent and a net weekly circulation of at least 5 percent, as defined in §76.5(k), in noncable households in the county served by the cable system or has been operational less than one full year. For purposes of this section, a station is considered operational as of the date it commences operation under program test authority. The viewing standards of this paragraph shall not apply for one full year from January 15, 1987 to otherwise qualified stations that commenced operation after July 19, 1985, but before January 15,1987 (the effective date of these rules).

(2) Any noncommercial educational television station's translator with 100 watts or higher power serving the cable community.

* * * * *

(j) *Substantially duplicates.* Regularly duplicates the network programming of one or more stations in a week during the hours of 6 to 11 m., local time, for a total of 14 or more hours.

(jj) *Usable activated channels.* Channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use but excluding channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations. *See* Part 76, Subpart K.

(kk) *Principal headend.* The location of the cable system equipment used to process the signals of television broadcast stations for redistribution to subscribers. Where more than one location meets the above definition, the cable operator shall designate a single location as the principal headend.

(ll) *Television survey season.* The twelve-month period beginning April 1 of one year and ending March 31 of the following year.

(mm) *Input selector switch.* Any device that enables a viewer to select between cable service and off-the-air television signals. Such a device may be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

3. Section 76.7, Special Relief, is amended by removing paragraph (g) and redesignating paragraph (h) as paragraph (g).

4. Section 76.53 is amended by revising the first sentence to read as follows:

§76.53 Reference points.

The following list of reference points shall be used to determine whether a television station is "qualified" pursuant to §76.5(d) and to identify the boundaries of the major and smaller television markets (defined in §76.5).

* * * * *

5. Section 76.55 is amended to read as follows:

§76.55 Qualified television station; method to be followed for showings.

A commercial television station shall demonstrate that it meets the viewing standard specified in §76.5(d)(1)(ii) on the basis of an independent professional survey of noncable homes conducted according to the following provisions:

(a) If the station has been operational, as defined in §76.5(d)(1)(ii), for at least one complete television survey season, the survey shall cover four separate, consecutive four-week periods, including one in each of the four quarters of the survey season (i.e., April-June, July-September, October-December, January-March), and be conducted pursuant to the methodology used to compile Appendix B of the *Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972).

(b) If the station has been operational, as defined in §76.5(d)(1)(ii), for less than one complete television survey season, the survey shall cover a single period of at least two weeks. The survey sample shall be proportionally distributed among the noncable homes in the county served by the cable system and shall be of sufficient size to assure that the reported results are at least one standard error above the required viewing standard.

6. A new section 76.56 is added to read as follows:

§76.56 Mandatory carriage of television stations.

(a) A cable system shall carry the signals of qualified television stations in accordance with the following provisions:

Cable channels	TV signals	Cable channels	TV signals	Cable channels	TV signals
21 - 29	7	62 - 65	16	98 - 101	25
30 - 33	8	66 - 69	17	102 - 105	26
34 - 37	9	70 - 73	18	106 - 109	27
38 - 41	10	74 - 77	19	110 - 113	28
42 - 45	11	78 - 81	20	114 - 117	29
46 - 49	12	82 - 85	21	118 - 121	30
50 - 53	13	86 - 89	22	122 - 125	31
54 - 57	14	90 - 93	23	above 125	25 % of capacity
58 - 61	15	94 - 97	24		

(1) A cable system shall carry the signals of qualified noncommercial educational television stations or translators of such stations, as follows:

(i) A cable system with fewer than 54 usable activated channels shall carry the signal of one qualified noncommercial educational station or translator;

(ii) A cable system with 54 or more usable activated channels shall carry the signals of two qualified noncommercial educational stations or translators.

(2) A cable system with 21 or more usable activated channels shall carry the signals of qualified television stations as follows:

(b) Where the number of qualified television station signals exceeds the number that a cable system is required to carry pursuant to paragraph (a) of this section, the cable system may select which of the signals to carry, *except that* carriage of qualified noncommercial educational station signals pursuant to paragraph (a)(1) of this section is nondiscretionary.

(c) In complying with the provisions of this section, a cable system shall be permitted but shall not be required to carry the signal of any qualified television station that:

(1) Substantially duplicates the signal of another qualified television station affiliated with a particular commercial national network;

(2) Would result in payment by the cable system of distant signal copyright fees;

(3) Fails to deliver to the cable system principal headend a picture of high quality providing enjoyable viewing and in which interference is no greater than just perceptible.

Note: In general, a signal level of -45 dBm for UHF signals and -49 dBm for VHF signals at the input terminals of the signal processing equipment would be needed to provide a picture of the required quality. Alternatively, a baseband video signal could be supplied.

(d) A cable system shall not accept payment or other consideration in exchange for carriage of the signal of any qualified television station carried in fulfillment of mandatory signal carriage obligations, *except that* any such station may bear any costs associated with: (1) delivering a good quality signal, as defined in §76.56(c)(3), to the cable system; (2) meeting copyright obligations that are incurred as a consequence of such carriage.

(e) A cable system shall identify on request those stations carried in fulfillment of its must carry signal carriage obligations.

7. Section 76.57. Provisions for systems operating in communities located outside of all major and smaller television markets, is removed.

8. A new section 76.58 is added to read as follows:

§76.58 Disputes concerning carriage.

(a) Any qualified television station not being carried may demand carriage from a cable system.

(b) As a prerequisite to a Commission decision concerning a television station's right to carriage, such demand shall be made in writing and shall include showings that:

(1) The station is a "qualified television station" as defined in §76.5(d);

(2) The cable system on which carriage is sought has not satisfied its carriage obligations under §76.56;

(3) To the extent that the matter is in dispute, the station delivers a good quality signal to the principal headend of the cable system pursuant to §76.56(c)(3).

(c) A cable system receiving a demand for carriage pursuant to this section shall respond in writing to the television station requesting carriage within fifteen (15) days of receipt of such demand. If the system declines to carry the station, the system's response shall state the reasons under the rules for such refusal.

(d) If no carriage agreement is reached between the parties, a ruling on the matter may be requested from the Commission. Such request shall contain a copy of the carriage demand, the response thereto, and any other information that may be considered relevant to a resolution of the question.

Pleadings responsive to such request may be filed within twenty (20) days. Initial requests and pleadings relating thereto shall be served on all parties to the proceeding. All factual allegations shall be supported by affidavit of a

person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them. An original and two (2) copies of the request and subsequent pleading(s) shall be filed.

(e) No cable system that, in refusing a carriage request, has complied in good faith with the mandatory signal carriage requirements of this chapter shall be subject to any forfeiture or penalty if it is later determined that the requesting station is entitled to carriage. If the Commission determines that the signal in question was or is entitled to carriage, the system shall commence such carriage within a reasonable period, to be specified by the Commission, and shall continue such carriage for at least twelve months.

(f) A cable system may be assessed a forfeiture or other penalty for failure to comply with a Commission order to carry a qualified broadcast station. Such Commission orders include action by the Chief of the Mass Media Bureau under delegated authority.

9. Section 76.59, Provisions for smaller television markets, is removed.

10. A new section 76.60 is added to read as follows:

§76.60 Carriage of other television signals.

(a) In addition to the qualified television station(s) carried pursuant to §76.56, a cable system may carry the signals of any other television station, low power television station, or television translator.

(b) A cable system shall be permitted, but shall not be required, to carry any subscription television broadcast program or any ancillary service transmission on the vertical blanking interval or the aural baseband of any television broadcast signal including, but not limited to, multichannel television sound and teletext.

11. Section 76.61, Provisions for the major television markets, is removed.

12. A new Section 76.62 is added to read as follows:

§76.62 Manner of carriage.

(a) Where a qualified television broadcast signal is carried by a cable system in fulfillment of the mandatory signal obligations set forth in this part of the rules:

(1) the signal shall be carried in full, without deletion or alteration of any portion, except as required by this part;

(2) the signal shall be carried in its entirety, without material degradation, on the lowest-priced, separately available cable service tier.

(b) Where a television broadcast signal otherwise is carried by a cable system pursuant to the rules in this part, programs broadcast shall be carried in full, without alteration or deletion of any portion, except as required by this part.

13. Section 76.64 is revised to read as follows:

§76.64 Expiration of mandatory carriage provisions.

The provisions of §§76.56, 76.58, and 76.60, and 76.62(b) shall remain in force until January 15, 1992, and shall thereafter be of no further force or effect.

14. Section 76.65, Determination of signal contours, is removed.

15. A new Section 76.66 is added to read as follows:

§76.66 Input selector switches.

(a) A cable system operator shall supply to each new subscriber and offer to supply to each existing subscriber an input selector switch for each separate television receiver to which cable service is provided by the cable operator. The operator shall comply with the following requirements in providing the switch and installing cable service:

(1) Supply and install the switch at no additional cost to new subscribers, unless the subscriber already has an input selector switching device or his/her television has such a device built-in;

(2) Offer to supply the switch to any person who is a subscriber on January 15, 1987, within six months of that date and thereafter on an annual basis until January 15, 1992, at no cost other than reasonable labor charges for installation, if necessary or requested, by providing the following form, in the same words or in other words that convey the same meaning, to all such persons who do not have input selector switches:

In accordance with FCC rules, we are offering to supply you with an input selector switch, at no cost, for each separate television receiver to which cable service is provided. This device, which connects both to the cable service and an antenna you supply, will enable you to select between cable service and off-the-air television signals. You may already have such switching capability, either in a separate device or as a built in feature to your television receiver. If you already have this capability you do not need an additional switch. However, if you do not have such switching capability, we will install a switch for a reasonable charge that reflects our actual labor costs or we will provide you a switch with written self-installation instructions at no charge. If you wish to obtain an input selector switch, please check the appropriate box below and return this form to our business office.

[ ] I wish to have an input selector switch installed. I understand that I will be charged reasonable labor costs for this service.

[ ] I wish to receive an input selector switch with installation instructions at no additional charge.

Please contact [NAME OF CONTACT AT CABLE SYSTEM OFFICE] at [ADDRESS AND TELEPHONE NUMBER] for further information.

(3) Comply with the following requirements with respect to antennas:

(i) If an antenna is present, the operator shall not recommend that the antenna be removed ;

(ii) If an antenna is not present, the operator shall inform the subscriber that the switch will be operational only if it is connected to an antenna, which the subscriber may purchase from an antenna supplier;

(iii) Where the operator installs a switch and an antenna is present, it shall connect the switch to that existing antenna.

(b) Input selector switches used for alternating between a cable system and an antenna for reception of television broadcast signals shall comply with the technical standards of §15.606(a) of the rules.

(c) The cable system operator shall provide the following information, in the same words or in other words that convey the same meaning, to each new subscriber at the time of installation of cable service and to existing subscribers that do not have input selector switches in writing within six months after January 15, 1987, and annually thereafter to all subscribers:

The FCC in 1986 adopted new requirements concerning cable system carriage of local television broadcast stations. Under these regulations, a cable system will be required to carry one or more local broadcast stations, but not necessarily all such stations, until January 15, 1992. After that date, carriage of local broadcast stations will be at the discretion of the cable operator. As a result, at this time or at a later date, you may not be able to receive all local television stations over your cable system. To ensure that you will retain the capability of receiving all of the broadcast stations that are available off-the-air, which might not be carried on the cable system, either now or in the future, it may be necessary to use an input selector switching device in conjunction with an antenna. This device, which connects both to your cable service and your antenna, will enable you to select between cable service and off-the-air television signals.

At this time, [NAME OF CABLE SYSTEM] is not carrying the following local broadcast stations: [LIST CALL LETTERS AND CHANNELS]

Questions related to input selector switches should be directed to [NAME OF CONTACT AT CABLE SYSTEM OFFICE] at [TELEPHONE NUMBER].

SEPARATE STATEMENT
OF
COMMISSIONER JAMES B. QUELLO

Re: Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Systems (MM Docket No. 85-349)

The must-carry rules adopted by the Commission on August 7, 1986, are the very minimum that I can support. I continue to believe that only comprehensive must-carry rules can guarantee full protection to our system of over-the-air television broadcasting and the government's legitimate interest, pursuant to Sections 1 and 307(b) of the Communications Act, in fostering a system accountable to the public interest. Cable, once installed, is a geographic bottleneck[1] with, unlike broadcasting, little or no program accountability to any public or government authority. As I have stated on many occasions, the Commission should have appealed the *Quincy* decision.[2] The court of appeals, in my opinion, went far beyond the scope of review invested in the judiciary and, left unreviewed, created uncertainty and conflict both over the appropriate First Amendment standard to be applied to cable,[3] as well as the appropriate standard to be used when reviewing an agency's exercise of its policy-making function.[4]

Although still short of the mark, I voted to adopt the Commission's refashioned must-carry rule. It does seem to represent a sincere attempt to adopt a workable and reasonable compromise position. It provides carriage for the most popular stations as well as public broadcasting stations. And it takes into consideration the plight of newcomers. I still, however, find it necessary to issue this separate statement to express disagreement with some aspects of the *Report and Order* as well as to elaborate on a substantial government interest that is not relied upon in our *Order* but which, in my view, is the single most significant reason why the new rules are, and the old rules were, constitutionally sound. I would also like to take this opportunity to state that if the plan we have adopted is not implemented in all significant respects, for whatever reason, I will be left with little choice but to urge that we reinstate our former must-carry rule, or, at a minimum, adopt a must-carry rule, without a sunset date, as urged in the industry compromise.

The most obvious shortcoming of our *Order* is that in justifying a must-carry rule, it does not rely on the substantial government interest in protecting the integrity of our Table of Assignments and ensuring public access to stations that have a statutory obligation to serve their local communities. In my view, both interests are substantial enough to justify a must-carry rule, without resort to any notion that broadcasters face economic ruin in the absence of a must-carry rule.

The Commission's *First Report and Order*, 38 F.C.C. 683 (1965) sought to protect all of the above interests. As we explained then:

> Persons unable to obtain CATV service, and those who cannot afford it or are unwilling to pay, are entirely dependent upon local or nearby stations for their television service.

The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (Sections 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. *Id.* at 699.

* * * *

> Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible could we consider countenancing such a practice. *Id.* at 705.

That these are substantial government interests seems intuitive. While not easily susceptible to empirical proof, they are the types of policy decisions that independent agencies were specifically created to consider. See note 2, supra. And the Supreme Court apparently agreed with our justification for a must-carry rule when, in *Capital Cities Cable, Inc. v Crisp*, 104 S. Ct. 2694, 2708 (1984), it noted that our "comprehensive regulations . . . to govern signal carriage . . . reflect an important and substantial federal interest."

The record before us again contains strong support for the notion that maintaining the integrity of our general spectrum allocation scheme and our longstanding statutory obligation to promote localism justify a must-carry rule.[5] That the Commission chose not to emphasize this substantial government interest justification is disheartening to say the least. I in no way mean to suggest that our principal rationale is not sufficient to support our rule. It should be more than adequate. On the other hand, we have consistently emphasized a licensee's local nonentertainment programming obligation in our radio and television deregulation orders. *Radio Deregulation*, 84 F.C.C.2d 968, 977 (1981); *TV Deregulation*, 98 F.C.C.2d 1076, 1091-92 (1984), reconsideration denied, F.C.C.2d (1986), appeal pending, *Action for Children's Television v FCC*, No. 86-1425 (D.C. Cir., filed July 23, 1986). This is an obligation which, in the past, we apparently regarded as arising from 307(b) of the Act. *Pinellas Broadcasting Company v. FCC*, 230 F.2d 204, 207, *cert denied*, 76 S. Ct. 650 (1956). And while the Commission may have subtly attempted to recast the obligation as solely within our discretion, the court of appeals went out of its way to note that the public interest standard imposes statutory nonentertainment programming obligations on licensees. *UCC v FCC*, 707 F.2d 1413, 1429, n. 46 (1983). Having made localism the cornerstone of our deregulatory policy, it simply makes no sense not to cite this as the most persuasive justification for adopting a must-carry rule. Our *Order* deserved much more than simply passing reference to this singularly most significant government interest.

I must also make some remark about our heavy reliance on the A/B switch. When I dissented from the Commission's refusal to appeal the *Quincy* decision, I

expressed considerable skepticism that the A/B switch could realistically be relied upon to maintain access to off the-air television in homes wired to a cable system. I re-emphasized that concern to my colleagues in July, pointing out that it was doubtful cable subscribers would maintain an antenna system solely to view the local stations a cable system chose not to carry. And commenters also voiced grave reservations about the utility of the A/B switch.[6] Nevertheless, I decided that a proposal requiring that the public be educated on the need for an A/B switch, coupled with a requirement that cable systems provide subscribers with an A/B switch, was worth trying. At a minimum, it has the potential of providing future empirical data on the marketplace feasibility of the switch. At the same time, it has been impossible not to take note of the criticism of our decision already reported by the press. While these views will not be considered by the Commission in issuing the *Order* it adopted on August 7, I want to forecast my intent to reconsider my vote should parties present persuasive arguments, on reconsideration, that the A/B switch, or something functionally equivalent, will not work. If an A/B switch will not work, then, until we can find an alternative means for ensuring the public's access to their local television stations, a permanent, comprehensive must-carry rule would be appropriate.

I want to make absolutely clear that I will use my best efforts to block any sunset of our must-carry rule should we have credible evidence that our program or assumptions underlying the program are in error. In addition, the comments we receive in response to the inquiries we will initiate concerning the compulsory license scheme, telco entry, and syndicated and network program exclusivity, will be highly relevant to my decision whether to permit sunset of our rules. In 1984, I dissented to the Commission's refusal to initiate an NOI to examine changes in the marketplace since elimination of the syndicated program exclusivity rule. I believed then, as I do now, that this Commission must consider the effect of its actions in conjunction with Congress and the Copyright Royalty Tribunal. Our's is a broad, not narrow, mandate to regulate broadcasting, and we cannot fulfill that responsibility in a vacuum. *In the Matter of Cable Television Syndicated Program Exclusivity and Carriage of Sports Telecasts*, 56 RR 2d 625, 633 (1984).[7]

As a last issue of major significance, I express considerable regret that I could not convince the Commission to do more for public broadcasting. Public broadcasting, although specially acknowledged in the Commission's plan, is certainly losing much of the coverage one might expect for a service chartered by Congress which continues significant funding. The diversity of views contemplated by Congress and supported through the years by this Commission can only be diminished under this plan which relegates to one video transmission pipeline a gatekeeping power over all video services that are licensed to serve the public interest in the area. While some may view elimination of must-carry requirements as a triumph of the marketplace, I view it as an unbalanced skewing of the marketplace to favor one participant over another. And, public broadcasting – created specifically to stand outside of the marketplace and offer alternative educational and cultural television fare – stands to lose carriage of many of its stations.

In sum, I regret that we have not adopted broader must-carry rules; the experimental course we have chosen seems still inadequate to redress the critical marketplace imbalances fostered by the *Quincy* decision. Nevertheless, our action today provides a much needed transition study period of partial must-carry with ample latitude for cable to exercise First Amendment judgments. I fervently hope that our system of *free* television broadcasting, which serves virtually all of the nation, is not seriously impaired by a misguided effort to preserve alleged First Amendment rights of a monopoly program distribution *pay* service that serves less than half of our citizens.

FOOTNOTES
Commissioner Quello's Statement

[1] The Commission's *Order* emphasizes that cable is misperceived as a "gatekeeper" because the Commission's policies made it unnecessary for subscribers to maintain alternative means for receiving off-the-air broadcast signals. I disagree with this simplistic evaluation of cable's power. In my opinion, even assuming that the A/B switch is a workable device, cable's ability to pick and choose which off-the-air stations to offer subscribers carries with it the power to affect a station's viewership and revenues, if not survivability. This power cannot be reduced so easily to a single-minded notion of consumer misperception. [2] I fully agree with one of the observations of a well-known columnist:

* * * *

. . . In one of the least appealing judicial pronouncements since a federal judge destroyed the phone company, a three-judge panel of the U.S. Court of Appeals decided in July to strike down the so-called "must-carry" rules affecting cablecasters. The rules required cable systems to offer their subscribers all available TV stations in their service area.

This sometimes did lead to duplication of program choices (if, for instance, there were two ABC affiliates or two public TV stations on the same cable system), but it also helped keep the system and the service locally accountable.

The Cable Complications, The Washington Post, Sept. 4, 1985 (Tom Shales).

[3] Our *Order* discusses in detail the constitutional controversy surrounding cable operators' First Amendment rights. As the *Order* points out, the Supreme Court has not addressed the question of whether cable is entitled to First Amendment Protection akin to that enjoyed by newspapers. And in the courts of appeals there is a considerable diversity of viewpoints on this subject. I hope the day will soon be here when all participants in video communications will enjoy full First Amendment rights. That day, however, has not yet arrived. So long as cable voluntarily enters the video market and heavily uses off-the-air broadcast signals as part of its public offering, it thereby submits itself to a regulatory scheme established by Congress for broadcasting. In other words, I still believe that the only court to have addressed specifically the constitutionality of our must-carry rules (prior to *Quincy*) correctly concluded:

The Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the air waves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a

unique impact upon, and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it. The public interest in preventing such a development is manifest.
Black Hills Video Corp. v FCC, 399 F.2d 65, 69 (8th Cir. 1968).

[4] The *Quincy* court, in faulting the Commission for having failed to develop an adequate factual basis to support its economic harm argument, imposed on this agency a standard of proof for rulemaking that was, in my opinion, far in excess of that normally applied when a court reviews an agency performing its functions as a legislator. It is well recognized that in rulemaking "the factual component of the policy decision is not easily assessed in terms of an empirically verifiable condition," but rather involves issues in which "'a month of experience will be worth a year of hearings.'" *Association of National Advertisers, Inc. v. FTC*, 627 F. 2d 1151, 1168 (1979) (quoting from *American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir. 1966) (en banc)). See also *FCC v. National Citizens Committee*, 436 U.S. 775, 813-14 (1978). Even if a stricter standard is to apply in cases where there are First Amendment implications requiring application of the *O'Brien* standard, the *Quincy* court appeared unwilling to give the Commission the benefit of any doubt. In another case, where the balancing of First Amendment rights were just as delicate and difficult as they were here, the Supreme court paid considerable attention to the agency's views:
The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment. That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem. Thus, before confronting the specific legal issues in these cases, we turn to an examination of the legislative and administrative development of our broadcast system over the last half century.
CBS, Inc. v. DNC, 412 U.S. 94, 103 (1973). It seems to me that the court of appeals simply ignored the highest court's teachings. 106 S. Ct. 930, 931 (1986).

[5] See e.g. Comments of the *Association of Independent Television Stations, Inc.* ; *Television Operators Caucus, Inc.* ; *National Broadcasting Company* ; *and National Association of Broadcasters*. See also Reply Comments of *National Cable Television Association* which, in justifying the industry proposed compromise, stated that the compromise tries to ensure "that there will continue to be available to the public a reasonable quantum of free television service." Reply comments at p. 3. But most trenchant is the comment of the Honorable John C. Danforth, Chairman, Committee on Commerce, Science and Transportation, in his letter to Chairman Mark S. Fowler on July 22, 1986, at page 4:
If the Commission acquiesces to circumstances that bestow gatekeeper status upon cable systems, this will conflict with three longstanding, substantial government interests -- the public's First Amendment right of access to diverse sources of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote a nationwide broadcasting service built upon local outlets.

[6] See e.g., Comments of the *National Association of Broadcasters*, June 1986; Letter to Commissioner James H. Quello from Preston Padden, June 19, 1986.

[7] I disagree with the *Quincy* court's apparent conclusion that there is no connection between the compulsory license scheme and the Commission's must-carry rules. *Quincy*, 768 F.2d at 1454, n. 42. See also, Comments of the *National Telecommunications and Information Administration* at p. 18, n. 30; Comments of *Association of Independent Television Stations, Inc.*

STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

Re: *Report and Order in MM Docket No. 85-349*

I fully subscribe to the *Report and Order's* finding that the advent of a burgeoning nonbroadcast video programming industry warrants a fundamental redefinition of the federal interest we seek to further through cable television regulation. In adopting the 1984 Cable Act Congress specifically recognized the tremendous contribution to program diversity that satellite-delivered nonbroadcast services have provided.[1] This same recognition is evinced in the *Report and Order*, and constitutes a definitive and welcome affirmation of the proposition that this Commission also has a mandate to make satellite-delivered programming available to the American people that is, in my view, of no less importance than the mandate for broadcast television embodied in Section 307(b) of the Act.

Creating a competitive balance between terrestrial broadcasting and satellite-delivered nonbroadcast programming for purposes of cable carriage is significant, but in my view it constitutes only a modest first step towards remedying the disequilibrium that results from current federal policies that may give cable television an unwarranted competitive edge in the program delivery market and to skew the program diversity that might otherwise develop in a totally free market.

There are several policies accountable for this remaining disequilibrium. There is, for example, the compulsory copyright license that cable enjoys for retransmission of distant broadcast signals.[2] The compulsory license precludes broadcasters and other program producers from negotiating and selling the rights to their own product, instead allowing cable systems to take broadcast product for what appears to be a fraction of its real value on the open market. By thus allowing cable to fill channels cheaply with existing broadcast programming the compulsory license may inhibit the increased production of new cablecast and broadcast programming, thereby resulting in an overall diminution in the amount of program diversity that might otherwise be achievable. As a majority of the Commission stated at the time of the *Quincy* decision, "the mass media marketplace will not be set entirely right until cable's copyright immunity is replaced with a scheme of full copyright liability, allowing unimpeded negotiations between the parties."[3] It follows that program diversity will not be truly maximized unless and until the current compulsory copyright license is reexamined.[4]

Exacerbating the negative effects of the compulsory license is the absence of distant signal carriage restrictions and syndicated program exclusivity rules, deleted by the Commission in 1980.[5] In particular the syndicated program exclusivity rule was intended to function as a copyright surrogate.[6] There has been considerable debate over the extent to which the legislative history of the Coypright Revision Act evinced an intent that these rules not be abolished by the Commission.[7] It appears that the Congress, and thus the Copyright Revision Act, may have anticipated that the Commission might fine-tune these rules but not jettison them altogether.[8] This possibility calls for us to carefully reexamine the effect of the rules' deletion on the operation of the Copyright Revision Act.[9]

The practice of granting monopoly franchises to cable system operators is another government policy that not only unbalances competition but also raises serious First Amendment concerns. As recognized – indeed, acquiesced in[10] –by the Commission, [c]able television service has tended to develop on a noncompetitive, monopolistic basis in the areas served. The normal protection afforded consumers by providing a choice between alternative suppliers has not, in most instances, been available to cable television subscribers.[11]

Exacerbating the monopoly franchise problem is the proscription against local exchange carriers' "provid[ing] video programming directly to subscribers in [their] own service area[s]."[12] I would hope that the Commission will now move with dispatch in releasing the inquiries into these subjects as outlined at Paragraph 213 of the *Report and Order.*

The effect of these governmentally created or condoned policies may well be to artificially restrict competition between cable systems and broadcast stations – indeed, between cable systems and anyone else. In this sense, government policy has helped to create the potential for cable to "bottleneck" reception of off-air and satellite programming. Depending on several factors, including the number of available off-air signals and the consumer's ability to receive video programming adequately without cable television service, the cable bottleneck can cross the line from potential to real.[13]

I support the adoption of the interim must-carry rules because they afford the cable operator greater programming discretion without causing enormous dislocations in the current environment. However, in light of what I view as the *Quincy* court's clear instruction,[14] my preferred course of action would have been to institute proceedings patterned after those conducted in the *Economic Inquiry*[15] right now.

I believe the information we need to conduct the necessary factual analyses and econometric studies is largely either available or readily obtainable. Having factual knowledge in a timely fashion would at least have the benefit of producing in concrete form a showing of whether any must-carry rules at all are warranted and, if so, where and to what extent. Admittedly, this approach is not perfect, but it would appear preferable to delaying rulemaking proceedings of any kind for several years.

I would perhaps be more inclined to defer ultimate rulemaking if I had more confidence that the input selector (A/B) switch and consumer education program we adopt today would ultimately solve the must-carry problem satisfactorily. Unlike my colleagues, however, I am not convinced that the regulations the Commission has adopted today will achieve what they are intended to achieve: in fact, I believe they will have quite the opposite effect. For in the guise of deregulating cable television, I fear the Commission will only have succeeded in re-regulating the cable industry.

It is difficult to recall when in recent history this Commission has imposed a set of conduct-regulating rules so overbearingly specific in nature. Thus, for example, the rules state that the system operator "shall" supply to each new subscriber an A/B switch. Existing subscribers are treated only a little less heavy-handedly, depending on your perspective. Although they are allowed to decline the initial switch offer, the rules specify that they must be re-offered switches, in writing, once a year, every year, until either they give in or the interim rules expire, whichever occurs first. The rules also provide a text for the annual switch offer, complete with boxes to check indicating whether the subscriber wishes the switch in-

stalled or wants to install it himself. Finally, once a year, every subscriber has to be advised in writing that in 1986 the Commission changed the must carry rules; that not all local signals, or ultimately *any* local signals, may have to be carried; that the subscriber needs a switch; that the subscriber may need an antenna; what the switch is and how it works; and any local signals that are not currently carried.

The rules we adopt go into excruciating detail on consumer's rights. To label these insistent consumer advisories "cable *Miranda* warnings" does not do them justice: a closer analogy would be the traditional *Miranda* warning coupled with an informative lecture on the American criminal justice system. And although I would support regulations aimed simply at *encouraging* subscribers to use switches, this anachronistic throwback to the days of regulatory micromanagment casts much too large a federal shadow for me to accept.[16]

Remarkably, despite the detail of the regulations which we adopt, the rules may also create a good deal of uncertainty regarding cable systems' responsibilities. For example, although the rules prescribe in detail how and when switches shall be offered, they fail to provide any exemption for those systems serving areas where, due to terrain or other factors, no off-air service is available in the first place. Similarly, although the rules prescribe that switches have to meet the technical standards of Section 15.606(a) of the Rules to prevent harmful signal leakage, they provide no clue as to how the system operator is expected to definitively assure that subscriber-installed switches do not leak due to defective installation or subsequent adjustment. Nor do they indicate whether the operator is responsible for post-installation repair and similar service calls and if so under what circumstances. Finally, and most critically, although the rules recognize the critical importance of antennas in making receivable the off-air signals that the switch makes available, the *Report and Order* glides glibly, and in my view inaccurately, over the conceded nonprevalence of outdoor antennas and its likely impact on the success of the switch program.

In sum, I fear that these rules may give cable systems and consumers elements that are the worst of both worlds. On the one hand, the conduct of the system operator is micromanaged and the discretion of the cable subscriber is substantially restricted; on the other hand, the Commission has left substantial room for interpretation and reinterpretation. I sincerely hope that interested parties will not argue on reconsideration that, having required switches, we must now also move on to a federal program to provide outdoor antennas. That, to me, captures the problem with new Section 76.66: it almost inevitably results not in a satisfactory solution to the problem at hand, but rather in spawning a series of seemingly endless reinterpretations, clarifications, waivers, and the like. In short, micromanagement usually begets yet more micromanagement.

I am terribly concerned that the only thing the Commission will have done by its action today is to create tremendous confusion, uncertainty and costs for cable operators, cable subscribers, and broadcasters, and that this unintended creation will drag us inexorably even further down a micromanagement path we have in virtually all other contexts heretofore declined to travel. Nor is this result simply a matter of philosophical handwringing. Far from it. For the total costs of implementing the input selector switch and consumer education program, including the costs to consumers of purchasing antennas, is estimated to cost from $483 million to over $1.6 billion. This would be an absolutely staggering burden to impose for any reason. In the context of this case, however, it would be imposed notwithstanding the program's substantial shortcomings and, perhaps worst of all, without even having first conducted proceedings designed to show whether or under what circumstances *any* prophylactic rules assuring cable subscribers' access to local broadcast programming are even warranted. The cable industry and, ultimately, cable consumers should not be asked to pay for what may in large measure be a nonsolution to a nonproblem.[17] I am simply not yet convinced that the "misperception" problem is the consumer's rather than the Commission's, or that we have a workable way of solving it.

FOOTNOTES
Commissioner Dawson's Statement

[1] H. Rept. 98-934, 98th Cong. 2d Sess. 1984, at 21.

[2] Copyright Revision Act of 1976, 17 U.S.C. Sec. 1 *et seq.*

[3] *Statement of Chairman Fowler and Commissioners Dawson and Patrick re Appeal of Quincy Cable TV. Inc. v. FCC*, August 2, 1985.

[4] See generally *Cable Retransmission of Broadcast Television Programs Following Elimination of the " Must - Carry " Rules*, a report issued by the Office of Policy Analysis and Development, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, 1985.

[5] *Report and Order in Docket Nos. 20988 and 21284.* 79 FCC 2d 663(1980), *aff'd sub nom. Malrite TV of New York v. FCC*, 652 F. 2d 1140 (2d Cir. 1981).

[6] *See, e.g., Report in Docket No. 20988*, 71 FCC 2d 951, 962, 976-77 (1979); *Report and Order in Docket Nos. 20988 and 21284, supra n. 5*, at 748.

[7] *See, e.g., Cable Copyright Liability: Alternatives to the Compulsory License*, by Mark M. Bykowsky et al., NTIA, U.S. Department of Commerce, 1982, 21-27.

[8] *Id.* at 27.

[9] Another way of approaching this issue would be to reexamine whether readoption of either or both the syndicated exclusivity rules and some form of distant signal carriage restriction might perhaps be warranted. I would certainly be open to this approach and look forward with particular interest to reviewing the relevant legal and factual analyses that may be presented in this context.

[10] In adopting its comprehensive regulatory program for cable television in 1972, the Commission elected to retain the current system of locally granted monopoly franchises. *Cable Television Report and Order*, 36 FCC 2d 143, 207-08 (1972).

[11] *Amendment of Part 74 of the Commission's Rules*, 15 FCC 2d 417, 425 (1968).

[12] This proscription is contained in Section 613(b)(1) of the 1984 Cable Act, and reflects the same cross-ownership restriction appearing in the Commission's Rules. Local television station licensees are likewise precluded under the Cable Act from owning cable systems within their stations' Grade B contours. 47 U.S.C. Section 613(a).

[13] Indeed, the possibility that unrestricted multiple ownership system ownership may measurably enhance cable's bottleneck aspect has prompted the Commission to specifically examine the issue in Gen. Docket No. 86-836.

[14] The *Quincy* opinion seems quite explicit on this point. "The Commission must make some effort to move beyond the amorphous in defining the interest served by the must-carry rules." Id. at 1461. Moreover, on the need for any must-carry rule to be tailored so as to assure the achievement of our articulated goal, the court was equally specific: "[I]n the administrative context O'Brien's substantial interest test 'translates . . . into a record that convincingly shows a problem to exist' . . . In the context of this case the question becomes whether the Commission has adequately proven that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable." Id. at 1454-55, citation omitted.

[15] *E.g., Inquiry into the Economic Relationships Between Television Broadcasting and Cable Television*, 65 FCC 2d 9 (1977); *Economic Inquiry Report*, 71 FCC 2d 632 (1979); *Report in Docket No. 20988, supra; Notice of Proposed Rulemaking*, 71 FCC 2d 1004 (1979), *Report and Order in Docket Nos. 20988 and 21284, supra.*

[16] Even at their regulatory zenith, the 1972 cable television rules never required cable system operators to explain to subscribers annually or any other way why, for example, the syndicated program exclusivity rules required the deletion of certain programs on certain stations, or why the sports exclusivity rules sometimes require that games on distant stations be blacked out.

[17] In this regard I would also note that the costs of implementing this program would be passed along to subscribers shortly after basic subscriber rates are deregulated on January 1, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JAMES F. RILL,
TRUSTEE FOR COMET INC.,
AND File No. 24279-CD-TC-1-85
PACIFIC TELESIS GROUP

For Consent to Transfer of
Control of Communications
Industries, Inc.

ORDER ON RECONSIDERATION

Adopted November 17, 1986; Released: November 28, 1986

By the Commission: Commissioner Quello concurring in the result.

BACKGROUND

1. The Commission has before it an Emergency Petition for Partial Reconsideration filed by Pacific Telesis Group (Pacific).[1] McCaw Communications Companies, Inc. (McCaw) filed an opposition and Pacific a reply.

2. On May 27, 1986 the Commission authorized the transfer of control of Communications Industries Inc. (CI) to Pacific.[2] This was done by a two step proceeding; in step one the Common Carrier Bureau under designated authority permitted the transfer of CI stock to a trustee, James F. Rill. In step two the Commission independently permitted the transfer of the stock from Rill, to Pacific. *See James F. Rill*, FCC 86-251, released May 27, 1986; *Communications Industries Inc.*, Mimeo 0770, released November 8, 1985. In the step two order, the Commission granted the transfer from Rill to Pacific. Because of Pacific's presence in both the San Francisco and the Sacramento markets (in the first case as a partner in the nonwireline systems; in the second as the wireline licensee), the grant was conditioned on Pacific's agreement not to become involved in negotiations or partnership voting or information flows in the San Francisco market leading to joint operation or other arrangements. The Commission took this action in order to guarantee the free flow of information in the Sacramento and San Francisco partnerships and to eliminate any possibility of Pacific discouraging agreements between the nonwireline partners in Sacramento and San Francisco. *Rill, supra*, at para. 48.

3. In its petition Pacific requests that the Commission reconsider the condition and alleges that it is detrimental to the proper conduct of business. It also claims that the condition conflicts with a prior order concerning the same issues and parties, *McCaw Communications of San Francisco, Inc.*, released March 7, 1985.[3] Pacific maintains that this condition, which is similar to a condition in a proposed Consent Decree governing the Dallas-Ft.Worth cellular partnership, should not have been imposed because this is a dissimilar factual situation.[4] In addition, Pacific states that the Department of Justice (DOJ) concluded that there was no basis for anticompetitive concerns regarding the San Francisco-Sacramento cellular markets and did not oppose the transaction or suggest the imposition of such a condition. Pacific also argues that the condition could result in Pacific being found in violation of the antitrust laws and the Modified Final Judgment (MFJ). *UnitedStates v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D. D. C. 1982), *aff'd sub nom. Maryland V. United States*, 460 U. S. 1001 (1983).[5] For instance, with Pacific not being able to participate in the voting, the other BACTC partners could vote to engage in interLATA telecommunications without a waiver of the MFJ prohibition that forbids Pacific from engaging in such activities.

4. In opposition, McCaw alleges that the condition serves an important public interest function by minimizing the anticompetitive problems that arise from Pacific's ownership of wireline and nonwireline cellular licensees in adjacent areas. McCaw further argues that the condition is consistent with the principles underlying the consent decree in Dallas. McCaw states that Pacific's argument about Pacific being placed in violation of the MFJ is without merit. McCaw argues that since BACTC is now an affiliate of a Bell Operating Company for purposes of the MFJ, McCaw could not place Pacific in violation of the law without placing BACTC itself in violation of the law as well.

DISCUSSION

5. Upon reconsideration we have decided to remove the condition. Initially, it should be noted that the condition was imposed at a time when Pacific and McCaw each held 47% of the San Francisco system. Since then, the resolution of local lawsuits will result in an increase of Pacific's holding to 62%, while McCaw's holding will decrease to 31.7%. We do not believe that it makes any practical sense to place a Dallas-like condition on the majority owner, since, to do so, would magnify management problems by insulating the majority owner from active participation in the business. Rather, if the "Dallas" condition has any viability outside that case, it stands for the proposition that, to avoid possibilities of collusion where we face a partner-competitor overlap, the minority partner should be required to be a passive investor.[6] Additionally, we do not believe we are bound to impose Dallas-like conditions on Pacific wherever it is engaged in a partner-competitor overlap. The condition in Dallas was imposed as part of a consent decree. DOJ proposed the condition in that case, and it was accepted by Pacific.[7] Thus, the matter was never adjudicated by the court. Under these circumstances, having balanced our concerns of maintaining competition against the problems that would be engendered by imposition of the condition in this case, we believe that the imposition of the condition on Pacific is inappropriate.

6. As a general proposition, moreover, we do not believe that we should impose such conditions as a matter of course. Responding to Commission invitations to settle cellular comparative hearings with merger agreements, the cellular industry, today, includes numerous partnerships in which partners in one market are competitors in another market. To impose conditions in all such situations could very well stifle the innovation in this emerging telecommunications technology. Moreover, we have

had, as yet, no indication of collusion between partners to the detriment of the public in markets where those partners are also competitors. Thus, on further consideration, we believe that the appropriate course is to not impose Dallas-like conditions, restricting the actions of partners, merely because the partners are also competitors in another market.

7. Accordingly, IT IS ORDERED, that the Emergency Petition For Partial Reconsideration, filed by Pacific Telesis Group IS GRANTED, and the condition described in paragraph 2 above, IS REMOVED, effective IMMEDIATELY.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Pacific also filed a Request for Stay. Since we are acting on the merits the stay request is now moot.

[2] Pacific is the wireline cellular operator in Sacramento. CI had ownership interests in various licenses including the nonwireline cellular license in San Francisco.

[3] In this Order we permitted Pacific to acquire a 23.5% interest in Bay Area Cellular Telephone Company (BACTC), the San Francisco nonwireline licensee, without imposing any conditions.

[4] *United States v. Pacific Telesis Group*, No. 86-1298 (C.D. Cal.)(Proposed Consent Decree). In that case Pacific agreed to limit its participation in the Dallas partnership (to essentially a passive investment role) because the Department of Justice (DOJ) found there was a possibility of collusion between Pacific and Lin Broadcasting Corp. (Lin) in Dallas and Los Angeles. In Dallas, Lin owns 60% of the nonwireline cellular licensee and manages the partnership, and Pacific owns 16%. Lin also holds a 50% voting interest and manages the Los Angeles Cellular Telephone Company the nonwireline cellular licensee in Los Angeles, in the same market where Pacific owns and manages the wireline franchise. In San Francisco, Pacific owns 47% and McCaw also owns 47% of BACTC. However, the Superior Court for the State of California issued an order granting summary adjudication in favor of Pacific, concerning specific performance of the partnership agreement. The Judge in this case determined that Pacific has a contractual right to additional partnership interests held by McCaw. When the interests subject to the Order are transferred, Pacific's interest in BACTC will increase to 62.7% and McCaw's interest will be 31.3%. *PacTel Mobile Access v. McCaw Communications of San Francisco*, Case Nos. 838970 and 838971,(California Superior Ct. for the City and County of San Francisco). In Sacramento, McCaw owns 95% of the nonwireline licensee and Pacific owns the wireline licensee.

[5] The MFJ which provided for the divestiture of AT&T prevents Pacific and other Bell Operating Companies from providing certain services or going into certain business ventures, except upon approval by the Court.

[6] If we were to follow the Dallas decision it would be McCaw who should be conditioned, since, in Dallas, the minority partner Pacific, was subjected to the condition.

[7] It is also significant that DOJ, the expert agency in antitrust enforcement, found that the partner-competitor overlap in this case appeared not likely to reduce competition and thus, did not propose a similar condition here. *United States v. Pacific Telesis Group*, No. 86-1298 (C.D. Cal.) (Proposed Consent Decree), n. 6. Although the DOJ determination reflected the respective ownerships at the time, it is not likely that the subsequent changes in ownership would alter the desirability of imposing a Dallas-like condition in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 28, 1986

CONTINENTAL TELEPHONE COMPANY REQUEST FOR DECLARATORY RULING

Continental Telephone Company of Virginia (CTCV) has petitioned the Commission for a declaratory ruling that it no longer is fully subject to the Commission's jurisdiction under the Communications Act of 1934 as a result of recent changes to its network configuration.

In its petition CTCV contends that its status as a fully subject carrier is based solely upon its previous network configuration serving Knotts Island, which is divided by the North Carolina - Virginia border. Until recently toll traffic originating on the North Carolina side of the island was routed over toll circuits connecting the North Carolina central office to the Norfolk, Virginia C&P toll center. This arrangement now has been reconfigured by changing the island's North Carolina central office switch to a remote switching unit served by a digital host switching office located at Shipps Corner, Virginia. Existing lines, which previously carried switched toll traffic, now carry Knotts Island traffic to Shipps Corner, where it is switched. CTCV therefore argues that the lines no longer are interstate toll lines, but rather, are part of a local distribution facility exempt from the Commission's jurisdiction under section 221(b) of the Communications Act, and concludes that this exemption results in it no longer being a fully subject carrier under the Communications Act.

Comments addressing this petition will be accepted on or before December 19, 1986, and reply comments on or before January 7, 1987. A copy of the petition may be viewed in Room 544, 1919 M Street, Northwest, Washington, D.C. or obtained from the Commission's contractor for public records duplication, International Transcription Services, Inc., Suite 140, 2100 M Street, Northwest, Washington, D.C. 20037, telephone (202) 857-3800.

For further information contact David Siddall at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE &
TELEGRAPH CO.

ITT WORLD
COMMUNICATIONS INC. File No. I-T-C-86-150

MCI INTERNATIONAL, INC.

RCA GLOBAL
COMMUNICATIONS, INC.

WESTERN UNION
INTERNATIONAL, INC.

Application for Authority Under
Section 214 of the Communications
Act of 1934, as Amended, to
Increase the Circuit Capacity of
the TAT-6 Submarine Cable System
Between the United States and
France and to Allocate, Acquire,
Activate and Operate the Additional
Circuits and to Acquire Necessary
Domestic and Foreign Connecting
and Transiting Facilities

ERRATUM

Released: November 28, 1986

By the Common Carrier Bureau:

1. The captioned Order and Authorization grants authority to owners of the TAT-6 cable to increase the capacity of that cable.

2. The second footnote to the chart attached to the Order stated that 25 of the voice circuits assigned to AT&T were whole circuits and the remaining circuits (eight) are half circuits. The footnote should state that eight of the voice circuits assigned to AT&T are whole circuits and the remaining circuits are half circuits.

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELE-
COMMUNICATIONS CORP. File No. I-T-C-87-001

Application for authority to
acquire and operate facilities
for service to Denmark

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 20, 1986 Released: November 28, 1986

By the Common Carrier Bureau:

1. The captioned uncontested application, filed on October 1, 1986 by MCI Telecommunications Corp. (MCI), requests authority to acquire and operate satellite and connecting facilities for direct service to Denmark. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Denmark by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-87-001 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 20 satellite voice circuits between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean;

b. lease from Comsat International and operate appropriate capacity in the east coast earth station;

c. lease and operate 20 voice circuits between the east coast earth station and MCI's West Orange, New Jersey operating office; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and Denmark and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Denmark, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. The authority granted herein is conditioned on compliance by MCI and its affiliates with Commission policies on uniform settlement rates and exclusive service, facility and traffic arrangements.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

UTICA CELLULAR
TELEPHONE
COMPANY File No. 33557-CL-P-115-A-84

For a construction permit to establish a cellular system operating on frequency block A in the Domestic Public Cellular Radio Telecommunications Service for the Utica-Rome, New York Metropolitan Statistical Area (MSA)

MEMORANDUM OPINION AND ORDER

Adopted November 20, 1986; Released:November 28, 1986

By the Common Carrier Bureau:

1. The application of Alpha Communications, Inc. ("Alpha") was selected first in the lottery held for the Utica-Rome, New York MSA on February 24, 1986. Alpha was a member of the Utica Cellular Telephone Company ("UCTC") partnership, a pre-lottery settlement group. Through amendments, UCTC has been substituted as the tentative selectee.[1] Empire State Cellular Communications ("Empire") has filed a petition to deny the application of UCTC for the non-wireline construction permit in the Domestic Public Cellular Radio Telecommunications Service for the Utica-Rome market. UCTC has filed an opposition to the petition to deny.

Financial Qualifications

2. Empire contends that UCTC has failed to provide a reasonable assurance of available financing to construct the proposed system and to operate it for one year. The petitioner asserts that the bank letter from Standard Chartered requires the submission of guarantees as a condition for the loan, and that the letter does not specify what guarantees will be required. It is further argued that the UCTC principals have failed to indicate a willingness to provide the necessary guarantees.

3. In the *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 219, 56 Rad. Reg. 2d (P&F) 8, 39 (1984), *recon.*, 58 Rad. Reg. 2d (P&F) 677 (1985), *further recon.*, 59 Rad. Reg. 2d (P&F) 407 (1985), we required all applicants for markets 91-120, such as Utica-Rome, to provide a reasonable assurance of financial ability to construct and operate their proposed system. We have reiterated that we have long relied upon the reasonable assurance test of *Multi - State Communications, Inc. v. FCC*, 590 F. 2d 1117 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1979), and, in applying this test, we determined that a bank letter must identify the applicant, be market specific, and contain sufficient terms of the proposed loan. *See Round IV Cellular Applications – Financial Qualifications, Order on Reconsideration*, FCC 86-46, Mimeo No. 36444, para. 14, released January 24, 1986.

4. The Standard Chartered bank letter identifies UCTC as the tentative lottery selectee for the Utica-Rome MSA and states the bank's willingness to provide $4.5 million to UCTC for the construction and operation of the market's non-wireline cellular system. Despite the inclusion of a guarantee provision, a bank commitment letter that spells out the conditions for receipt of the loan complies with our reasonable assurance standard. Therefore, we find that the Standard Chartered bank letter to UCTC satisfies our financial requirements.

5. After careful review of the application and the related pleadings, we find UCTC to be financially, legally, technically and otherwise qualified to be a Commission licensee.

Ordering Paragraphs

6. Accordingly, IT IS ORDERED that the application of Utica Cellular Telephone Company, File No. 33557-CL-P-115-A-84, IS GRANTED.[2]

7. IT IS FURTHER ORDERED that the Petition to Deny filed by Empire State Cellular Communications IS DENIED.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Rules.

Kevin J. Kelley

Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The Commission announced UCTC as the tentative selectee in Public Notice, Report No. CL-86-104, Mimeo No. 3530, released April 2, 1986. The UCTC application is composed of the application of Alpha, File No. 33557-CL-P-115-A-84, as amended March 19, 1986, regarding ownership, legal and financial qualifications, and the application of Courier Communications Corporation, File No. 34065-CL-P-115-A-84, as amended March 19, 1986, regarding technical and engineering proposals.

[2] UCTC has filed a "Motion for Approval of Further Settlement and Grant of Application" and Empire has filed a petition for clarification concerning this motion. Also, UCTC has filed an opposition to the petition for clarification. Because of the serious allegations raised in these pleadings, we are unable at this time to grant UCTC's motion for approval of further settlement. UCTC's motion states that "in the event that the Commission does not approve this proposed further settlement . . . the Partnership as presently constituted and reported to the Commission on March 19, 1986 shall continue to prosecute its application, and upon grant, to expeditiously construct and operate the proposed cellular system." Accordingly, to prevent further delay of service to the public, we are granting the application of the UCTC partnership as presently constituted. The UCTC motion and the issues discussed in the related

pleadings will be addressed in a later proceeding. Our discussion and decision here are limited to the issues raised in Empire's petition to deny and UCTC's responsive pleading.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-297

In the Matter of

Amendment of Part 67 of the
Commission Rules and
Establishment of a Federal-State
Joint Board.

ORDER

Adopted: November 21, 1986 Released: November 28, 1986

By the Chief, Common Carrier Bureau

1. The People of the State of California and the Public Utilities Commission of the State of California (California) have filed a request in their October 17, 1986 comments in this proceeding, that we extend the date for filing comments on both the Class A Manual and the Class B Manual, as established in the Federal-State Joint Board's Order Inviting Comments and Request for Data.[1] California requests at least four more months, or until February 17, 1987, within which to file comments in this proceeding.[2]

2. California asserts that on September 23, 1986, its Evaluation and Compliance Division requested information from Class A Local Exchange Companies in California (Pacific Bell, General Telephone Company of California, and Continental Telephone) regarding the revenue impact of the proposed revisions to Part 67 of the Commission's Rules, the Separations Manual. It states that these companies' responses are deficient and that more time is needed to prepare more accurate estimates of the impact of these proposed changes.

3. We deny the request. A grant of this extension of time would generate an unacceptable delay in the whole Uniform System of Accounts (USOA) process. Part 67 must be revised on schedule so that it conforms to the new USOA when it becomes effective on January 1, 1988. We have already received numerous comments on the Class A Manual, and California is the only party seeking such an extension. California has not presented sufficient reasons to grant such a delay.

4. Moreover, California's request does not meet the requirements of Section 1.46 of our Rules, which states that petitions for extension of time are not routinely granted, that such requests for extension of time must be accompanied by a motion, and that such requests regarding the filing of comments in rulemakings must be filed at least seven days before the filing date. 47 C.F.R. Sec. 1.46. California's request for an extension was contained in its comments and, therefore, could not properly serve as a request for extension of time in which to file those comments.

5. Accordingly, IT IS ORDERED, that the request for extension of time filed by the People of the State of California and the Public Utilities Commission of the State of California on October 17, 1986, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 67 of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket No. 86-297, FCC 86J-4 (released July 25, 1986); Amendment of Part 67 of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket No. 86-297, Mimeo No. 6803 (released September 8, 1986); Erratum, Mimeo No. 6952 (released September 15, 1986).

[2] Comments on the Class A Manual were due October 17, 1986. Comments on the Class B Manual were due October 31, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-78

In the Matter of

Amendment of Part 90 of the Commission's rules to permit secondary fixed tone signalling and alarm operations by end users of trunked SMRS systems — RM-5220

REPORT AND ORDER

Adopted: November 10, 1986; Released: December 1, 1986

By the Commission:

Introduction

1. On March 6, 1986, the Commission adopted a *Notice of Proposed Rule Making* (NPRM) proposing to allow trunked Specialized Mobile Radio (SMR) system end users to conduct fixed signalling operations on a secondary basis within the area normally covered by the licensee's mobile service operation.[1] The NPRM also proposed to require any fixed use to meet the technical and operational rules specified in Section 90.235,[2] and not to count fixed transmitters toward the Commission's loading requirements.[3] The NPRM was issued in response to a petition filed by the American SMR Network Association (ASNA). This Report and Order adopts most of the rules proposed in the NPRM as well as certain recommendations put forth in the comments.

Background

2. In general, we have maintained a policy of licensing private fixed, point-to-point operations in spectrum governed by Part 94 of the rules, while reserving spectrum allocated under Part 90 to satisfy private mobile communication requirements. One exception to this policy has been for fixed tone signalling operations. For example, we have permitted secondary fixed tone signalling on frequencies allocated to the Power and Petroleum Radio Services since the 1950's.[4] We extended this capability to the Local Government, Police, and Fire Radio Services in 1963[5] and later to the Highway Maintenance and Forestry Conservation Radio Services in 1975.[6] In each instance we made the determination that such fixed use would not disrupt the primary function of these frequencies, i.e., base/mobile dispatch communications. The NPRM proposed to extend this same fixed tone signalling capability to trunked SMR licensees.

3. Comments on the proposal were received from the American SMR Network Association, Inc. (ASNA); Motorola, Inc. (Motorola); the National Association of Business and Educational Radio, Inc. (NABER); LaVonne H. Cordon (Cordon); the E.F. Johnson Company (Johnson); and the General Electric Company (GE). Reply comments were filed by ASNA.

4. All of the comments support our proposal to permit SMR end users to operate fixed units in addition to and in the same geographic area as their mobile units for certain tone and alarm signalling functions. Further, there is total agreement that such operations be licensed on a secondary basis and that fixed transmitters not count toward meeting SMR loading requirements.

5. While noting their support for the NPRM, however, several commenters suggest that we go further. For instance, Motorola expresses concern that under the proposal an end user must be a primary licensee, that is to say authorized a mobile unit, before it will be allowed to conduct fixed signalling operations. It contends that a requirement that each user have at least one mobile unit before any fixed use would be authorized serves no useful purpose. Motorola maintains that existing loading requirements and the marketplace will prevent fixed operations from becoming primary on these mobile frequencies. Further, Motorola argues that this approach would encourage some users to obtain a mobile license even though they had no mobile communication requirement. This, according to Motorola, would achieve compliance with the letter of the new rule but would frustrate the Commission's policies and rules. Motorola reasons that the rule would introduce misleading mobile counts as users seeking fixed service added mobile units solely to qualify for fixed operations. It urges us to allow SMR licensees to provide fixed tone signalling service to eligible users regardless of whether they have a mobile communications requirement. According to Motorola, "the SMR licensee should have the discretion to make better utilization of his system as long as he meets the obligations of non-interference and mobile loading levels." ASNA supports the Motorola position.

6. GE also urges us to broaden the proposal. It suggests that we not limit the uses of fixed transmissions to the activities currently listed in Section 90.235. More specifically, it recommends that we allow end users to transmit data related to the status or conduct of their business. Johnson's comments parallel those of GE. It encourages the Commission to allow telemetry and automatic vehicle monitoring operations. NABER, in a similar vein, suggests that we investigate the feasibility of allowing other types of signalling on SMR systems. ASNA, in its reply comments, supports the notion of expanding the scope of fixed service for SMRs, but voices concern that broadening the scope of the proceeding might delay adoption of the original proposal. ASNA urges the Commission to finalize this proceeding first and then to explore additional actions which may be of benefit.

7. ASNA also addresses the matter of licensing fixed operations on trunked SMR frequencies. According to ASNA, the optimal licensing scheme would be to treat as mobiles all fixed units that satisfy the twenty foot antenna height rule applicable to control stations. In other words, users would not have to provide the geographic coordinates for a fixed unit if the height of the unit's antenna does not exceed 20 feet.[7] Under the ASNA proposal, the applicant would complete items 1 through 6 and item 13 on the Form 574. A new unique station classification code, FX3, would be used to eliminate any confusion as to the function a particular transmitter performs. ASNA also recommends that all users of fixed signalling on trunked SMR systems be allowed to operate under the more liberal Power Radio Service standards for number of repeat transmissions.

Discussion

8. We have considered all of the comments carefully. Our proposal to allow ancillary fixed tone and alarm signalling operations by trunked SMR end users with a mobile communications requirement and not to count fixed units toward meeting the loading requirements was unanimously supported by the comments. As we stated in the NPRM, the decision whether to permit fixed operations on mobile service frequencies has been based in the past on the potential for interference to base/mobile dispatch operations. With regard to the SMR service, since frequencies available for trunked SMR operation are assigned on an exclusive basis, interference to other co-channel SMR systems is not a problem. As for intrasystem interference, there are now approximately three thousand licensed SMR systems providing mobile dispatch service and the demand for such service is increasing. There are also our loading standards and SMR channel recovery program. We believe it will be in the SMR operator's own self-interest not to let fixed use interfere with its present mobile dispatch service. Therefore, we will now permit trunked SMR licensees and end users to conduct fixed ancillary tone and alarm signalling operations on their mobile service frequencies. In addition, fixed units will not be counted toward SMR loading requirements. The primary purpose of these frequencies is to meet mobile communications needs. To permit fixed units to count toward mobile loading would detract from this fundamental purpose. Also, the loading standards were designed with mobile communications in mind, not the short, intermittent type of transmissions usually associated with tone and alarm signalling. They would thus be inapposite, in any event, in the fixed context.

9. Under the Motorola proposal an SMR licensee could provide fixed service to an eligible entity regardless of whether that entity has a mobile communications requirement. In other words, the entity's total communications requirement (its primary use of the frequency) could be fixed. While this is somewhat of a departure from the intent of Section 90.235, we have previously permitted private land mobile eligibles to use mobile service frequencies for fixed operations even when there is no mobile communication requirement.[8] Therefore, such provisions are not new to Part 90. As we stated before, however, the test is whether this additional fixed use will result in interference to base/mobile dispatch communications. We think not. There is every reason to believe that the SMR operator will act in its own self-interest and not let fixed use interfere with its primary function of providing mobile dispatch service. Moreover, requiring an end user to purchase an unnecessary mobile unit just so they may qualify for fixed operation serves no useful purpose. In fact, as Motorola pointed out, it could result in misleading mobile loading figures. Accordingly, we are adopting rules allowing trunked SMR licensees to provide fixed signalling service to eligible end users regardless of whether such users have a mobile communications requirement.

10. In the NPRM we proposed to limit fixed signalling to those activities presently permitted by Section 90.235. In view of the comments and after considering this matter further, we have decided not to restrict SMR fixed signalling transmissions to those specified in Section 90.235. When we initially adopted rules permitting secondary fixed use on mobile service frequencies, we wanted to minimize the interference potential on shared frequencies. In a shared frequency environment, any number of different entities may be licensed for the same channel in the same general area. As the number of different users in an area increases, so does the interference potential. Therefore, in order to protect mobile communications, we placed certain limitations on fixed use. Limiting the purposes for which fixed signalling could be used was one way to reduce the interference potential to mobile operations. Another method used was to limit the message length. In contrast, with trunked SMR frequencies we are not faced with the shared frequency problem because SMR frequencies are assigned on an exclusive basis. Further, existing marketplace forces as well as our loading requirements should sufficiently minimize the possibility of interference to mobile users on an SMR system. Consequently, we have decided not to apply the restrictions on fixed signalling contained in Section 90.235 to such activity in the SMR service.[9] For the same reasons, we see no reason to place restrictions on message length.

11. The last issue raised in the comments concerns the licensing of fixed operations on trunked SMR frequencies. In adopting licensing procedures here we seek to avoid unnecessarily burdening licensees with paper work as well as to minimize the impact on Commission resources. With this in mind, we are permitting existing SMR licensees and licensed end users, at least for the present, to conduct fixed operations under their current base/mobile license. There will be no need for an immediate license modification.[10] The only exception to this would be if a licensee plans to have a remote fixed site with an antenna that does not meet the 20 foot criterion. In these cases, a license modification is required prior to placing such fixed stations in operation. Applicants applying for a new SMR station license or an end user mobile license after the effective date of these rules and intending to conduct fixed signalling operations must be specifically licensed for such use. In order to distinguish fixed stations used for signalling purposes from control stations we are adopting an FX3 class of station code for secondary fixed tone signalling operations. Mobile applicants wishing to have fixed signalling capability need only add an FX3 class of station code on their application.[11] There is no need to list the location of each fixed transmitter so long as it complies with Section 90.119.

12. In the NPRM we proposed to put the new rules in Section 90.235 since the proposal simply involved extending the capability permitted in this section to end users of SMR systems. The same technical and operational restrictions were to apply. The final rules adopted herein, however, differ substantially from the rules permitting fixed signalling outlined in Section 90.235. For this reason, we are putting the rules allowing ancillary fixed use by trunked SMR end users in those sections specifically applicable to SMR systems.

13. On October 16, 1986, the Commission adopted a *Notice of Proposed Rulemaking* in PR Docket 86-404, entitled "Amendment of Part 90, Subparts M and S, of the Commission's Rules." Among other things, that Notice proposes to eliminate loading standards as a means of regulating trunked SMR systems. If the proposal to eliminate loading is ultimately adopted, SMR frequencies could, as a practical matter, be used exclusively for fixed purposes even though the frequencies are intended to satisfy mobile communications. We do not believe that this poses a serious problem. There are currently three thousand SMR systems in operation providing mobile

dispatch service to more than one million users. These systems have developed a viable business offering mobile communications service to Part 90 eligibles. The end users, in turn, have come to rely heavily on this service for their routine mobile communications needs. With this solid foundation and the continuing increase in demand for mobile communications capability, it is very unlikely that SMR licensees will cease to provide mobile service. In the unlikely event that a large number of SMR systems convert to predominantly fixed use, we can reexamine our decision here in light of mobile demand and spectrum availability at that time.

14. Pursuant to Section 605 of the Regulatory Flexibility Act of 1980, we certify that the changes in this Report and Order will not have a significant economic impact on a substantial number of small entities. The rules adopted herein merely provide SMR licensees with more flexibility in using their communication systems. While those rule changes, because they could increase revenues, may have some economic impact, we do not anticipate it will be significant. The bulk of an SMR operator's revenues should continue to be from its two-way operations.

Paperwork Reduction Act Statement

15. The action taken herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labelling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

Ordering Clauses

16. Accordingly, IT IS ORDERED, that pursuant to Section 4(i) and 303(r) of the Communications Act of 1934, as amended, Part 90 of the Commission's Rules is AMENDED effective January 5, 1987, as set forth in the Appendix below. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

17. Further information on this matter may be obtained by contacting Herbert Zeiler (202) 634-2443, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554.

Federal Communications Commission

William J. Tricarico
Secretary

APPENDIX

Part 90 of the Commission's Rules is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. as amended, 1066, 1082; 47 U.S.C. 154, 303 unless otherwise noted.

2. Section 90.376 is amended by revising paragraph (a) and adding a new paragraph (c) to read as follows:

§90.376 Restrictions on operational fixed stations.

a) Except for control stations, operational fixed stations will not be authorized in the 816-821 and 861-866 MHz bands. This does not preclude secondary fixed tone signaling and alarm operations authorized in §90.235 or in paragraph (c) of this section.

b) ***

c) Trunked SMR licensees and licensed end users may use the system for fixed ancillary signaling and data transmissions. All such fixed use is subject to the following requirements:

(1) All operations shall be on a secondary, non-interference basis to the primary mobile operation of any other licensee.

(2) The output power shall not exceed 30 watts (at the remote site).

(3) Any fixed transmitters will not count toward meeting the mobile loading requirements nor be considered in whole or in part as a justification for authorizing additional frequencies in the licensee's mobile system.

(4) Automatic means shall be provided to deactivate the remote transmitter in the event the carrier remains on for a period in excess of three minutes.

(5) Operational fixed stations authorized pursuant to the provisions of this paragraph are exempt from the requirements of §90.425 and §90.429.

3. Section 90.637 is amended by revising paragraph (a) and adding a new paragraph (c) to read as follows:

a) Except for control stations, opertional fixed stations will not be authorized in the 816-821 and 861-866 MHz bands. This does not preclude secondary fixed tone signaling and alarm operations authorized in §90.235 or in paragraph (c) of this section.

b) ***

c) Trunked SMR licensees and licensed end users may use the system for fixed ancillary signaling and data transmissions. All such fixed use is subject to the following requirements.

(1) All operations shall be on a secondary, non-interference basis to the primary mobile operation of any other licensee.

(2) The output power shall not exceed 30 watts (at the remote site).

(3) Any fixed transmitters will not count toward meeting the mobile loading requirements nor be considered in whole or in part as a justification for authorizing additional frequencies in the licensee's mobile system.

(4) Automatic means shall be provided to deactivate the remote transmitter in the event the carrier remains on for a period in excess of three minutes.

(5) Operational fixed stations authorized pursuant to the provisions of this paragraph are exempt from the requirements of §90.425 and §90.429.

FOOTNOTES

[1] *Notice of Proposed Rule Making*, PR Docket 86-78, 51 Fed. Reg. 9853, (March 21, 1986).

[2] In general, these restrictions limit the fixed station's power, emission, and message length as well as the nature of fixed operations. The restrictions are intended to minimize the effect of fixed operations on the primary mobile communications.

[3] *See* 47 C.F.R. §§90.366, 90.631 (1985).

[4] Examples of such fixed use include verifying equipment status, indicating an equipment malfunction, the presence of an intruder, fire or other hazardous condition, and correcting an abnormal condition.

[5] *Report and Order*, Docket 14424, 28 Fed. Reg. 7945 (August 3, 1963).

[6] *Report and Order*, Docket 19662, 40 Fed. Reg. 21733 (May 19, 1975).

[7] See Section 90.119, 47 C.F.R. §90.119 (1985).

[8] See Section 90.261, 47 C.F.R. §90.261 (1985).

[9] Accordingly, end users may transmit data traffic related to the status or conduct of its business, telemetry, or other non-voice messages as well as the permissible uses proposed in the NPRM. We are specifically excluding automatic vehicle monitoring (AVM) transmissions, however, since this is a mobile application of the frequencies rather than a fixed use. We believe authorizing AVM use on these frequencies is beyond the scope of this proceeding.

[10] Existing licensees must modify their license at renewal or the next time a license modification is required for some other reason. At that time licensees should follow the procedures put forth for new stations intending to conduct fixed signalling operations.

[11] End users intending only to use the frequencies for fixed operations (i.e. those entities not having a mobile communications requirement) must obtain a license. In this case, applicants must complete items 1 through 6, 13, and 20-25 on the top half of Form 574.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-326

In the Matter of

AT&T
COMMUNICATIONS Transmittal No. 434

Revisions to Tariff F.C.C.
Nos. 2, 9 and 10

AT&T
COMMUNICATIONS Transmittal No. 435

Revisions to Tariff F.C.C. Nos. 1, 9 and 10

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 12, 1986; Released: December 2, 1986

By the Commission: Commissioner Dennis not participating.

I. INTRODUCTION

1. By Memorandum Opinion and Order adopted October 31, 1985, we denied petitions to reject or suspend American Telephone and Telegraph Company's (AT&T) Megacom and Megacom 800 tariff filings.[1] Accordingly, on November 4, 1985, the tariffs became effective. At the same time, we instituted an investigation of AT&T's demand and revenue projections for its Megacom services and imposed accounting requirements to protect users during the pendency of the investigation.[2] MCI Telecommunications Corporation (MCI) and US Telecom, Inc. have filed petitions for reconsideration of our *Megacom Order*. For the reasons discussed in the following paragraphs, we dismiss or deny the petitions for reconsideration.

2. Megacom is a distance and usage-sensitive outward dialing service in which calls are billed individually at rates that are lower than those for Message Telecommunications Service (MTS). Megacom 800 provides the same service for inward dialing. Neither of the Megacom services includes the costs of local access to AT&T's network. Customers arrange access to an AT&T Class 4 switch by providing their own facilities or by obtaining access from local exchange carrier (LEC) special access tariffs or AT&T Tariff F.C.C. Nos. 9 and 11.

II. SUMMARY OF PLEADINGS

3. MCI contends that the Megacom offerings enable AT&T to "unfairly leverage" its 800 Service[3] monopoly to gain an unfair competitive advantage in offering WATS services. It explains that high capacity access lines, such as T1 lines, used for the closed end of Megacom services can be bundled together and used interchangeably. Therefore, customers with a need for both 800 Service and a WATS-type service can realize access cost savings by subscribing to both Megacom services rather than subscribing to Megacom 800 and a competitive WATS-type service such as that offered by MCI.[4] Accordingly, MCI asks us to (1) find that the Megacom services allow AT&T to leverage unfairly its 800 Service monopoly to obtain a competitive advantage in the WATS market and that this constitutes an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b); and (2) require AT&T to provide the other common carriers (OCCs) with access to the AT&T 800 Service data base so that they may develop competitive 800 Services.[5]

4. In its reconsideration petition, US Telecom seeks suspension of the Megacom tariffs for several reasons. First, it asserts that our conclusion that resale of Megacom is an effective check against anticompetitive behavior by AT&T is not adequately supported in the record.[6] Second, it argues that Megacom cannot be categorized as a new service and that we erred in finding that different features or the use of different facilities constitutes a new service.[7] Third, U.S. Telecom asserts that AT&T's cost support data for Megacom fails to comply with the requirements of Sections 61.38(b) and (c) of our Rules, 47 C.F.R. § 61.38 (b) and (c). It contends that failure to comply with those rules requires rejection or suspension of the Megacom tariffs. It argues that the *Megacom Order* did not demonstrate that Megacom conforms to the Fully Distributed Cost Standard or, in the alternative, that the standard does not apply. Finally, U.S. Telecom asserts that we improperly allowed the Megacom tariffs to become effective while relying on a subsequent investigation to assure that they are just and reasonable. It states that this Commission must make a factual determination of whether the rates are just and reasonable before they are allowed to take effect.

5. In response to the petitions, AT&T filed a Motion to Dismiss. It asserts that the petitions impermissibly seek reconsideration of an interlocutory Order setting a matter for investigation and should be dismissed pursuant to Section 1.106(a)(1) of the Rules, 47 C.F.R. § 1.106 (a)(1).[8] AT&T also addresses the merits of the petitions. AT&T contends that there is no basis for MCI's speculation that subscribers would have an incentive to take all WATS and 800 Service from a single carrier because customers could combine traffic onto the same lines thereby reducing their access line requirements. AT&T argues that it does not have an 800 Service monopoly since the Bell Operating Companies (BOCs) afford equal 800 Service access to MCI and other interexchange carriers (ICs) under the NXX plan. Moreover, AT&T asserts that: (1) the 800 Service data base is an interexchange asset properly assigned to it upon the divestiture of the Bell System; (2) it would subvert the operation of the competitive marketplace to give AT&T's competitors a "free ride" on AT&T investment in 800 Service technology instead of requiring them to develop their own service innovations; (3) MCI's interim solution (five-mile free transport) is unwarranted; and (4) the 800 Service data base issue is being considered in a pending rulemaking proceeding and therefore should not be considered in the context of this proceeding.[9] AT&T states that the US Telecom petition to reconsider the denial of petitions to suspend must be denied because an effective tariff cannot be suspended

and, in any case, that petitioner's arguments merely repeat those made by it and other parties in initially seeking rejection or suspension of the Megacom tariffs.

6. MCI filed a reply to AT&T's motion. It contends that Section 1.106(a)(1) is inapplicable because the *Megacom Order* is not interlocutory, since it did not designate any issues for hearing or otherwise commence a hearing proceeding. It further argues that AT&T does enjoy a monopoly over 800 Service, that the issue here is not so much the lawfulness of the Megacom tariffs as it is the fashioning of a remedy to cure a "patent anticompetitive situation," and that this Commission should act to address and rectify the inequalities between AT&T and MCI regarding the 800 Service data base.[10]

III. DISCUSSION

7. The petitioners are seeking reconsideration of three distinct decisions in our *Megacom Order*. That Order denied petitions to reject the tariff, established the scope of our investigation of the Megacom tariff, and denied petitions to suspend the tariff during that investigation. AT&T has asserted that we cannot or should not consider the merits of any of the petitioners' arguments because a tariff cannot be suspended after it becomes effective and the other challenged decisions are "interlocutory."

8. We agree that the statutory scheme does not give this Commission authority to suspend a tariff after it has become effective. suspension is essentially the equivalent of a judicial stay that preserves the *status quo* while a controversy is being resolved. The nature of the action requires that it be taken before the new tariff becomes effective. Our suspension power is conferred by Section 204 of the Communications Act, 47 U.S.C. § 204. The language of that section indicates that the suspension must be exercised before the new rate or provision becomes effective. Petitions to reconsider our decision denying petitions to suspend the Megacom tariff were filed after the Megacom tariff became effective. We cannot entertain reconsideration petitions under those circumstances. Therefore, the petitions will be dismissed insofar as the petitions seek reconsideration of our decision not to suspend.

9. AT&T correctly notes that Section 1.106(a)(1) of our Rules appears to preclude reconsideration of "interlocutory actions." That section provides in part:

> A petition for reconsideration of an order designating case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained.

10. The pleadings do not cite any Commission precedents that appear to determine whether decisions denying petitions to reject or decisions establishing the scope of a tariff investigation should be deemed to be "interlocutory" for purposes of that particular rule. We conclude that the denial of a petition to reject a tariff should be deemed "interlocutory" because such an action is analogous to the denial of a motion for judgment on the pleadings. A decision to reject usually requires a determination that the tariff is patently unlawful. A decision that a tariff is not patently unlawful does not foreclose a Section 204 or Section 208 proceeding to determine whether the challenged rate or practice is lawful.[11] A decision not to reject a tariff is generally an interlocutory, rather than final, action and thus is too provisional to warrant reconsideration. Therefore, we will dismiss the petitions insofar as they seek reconsideration of our decision to deny petitions to reject the Megacom tariff.

11. A petition for reconsideration that essentially seeks an expansion of the scope of a Section 204 tariff investigation may, however, make a sufficient contribution to the process to warrant consideration. Section 1.229 of our rules does permit the filing of motions to enlarge, change or delete issues in hearing proceedings. Although the rules for hearing proceedings do not precisely fit a Section 204 tariff investigation, we have decided that a reconsideration petition in a Section 204 investigation that serves the same function as a motion to enlarge issues should not be deemed to be interlocutory for purposes of Section 1.106(a)(1). These petitions fall within that category. We have, nevertheless, concluded that the petitions before us in this proceeding have not presented persuasive reasons for expanding the scope of this particular tariff investigation.

12. Our review of MCI's petition indicates no issues requiring further investigation at this time. MCI's argument concerns the fact that AT&T's current monopoly for 800 Service enables Megacom customers who need both 800 Service and WATS-type services to combine their traffic and obtain lower access costs.[12] This appears to be true; however, it is not relevant to our investigation of Megacom rates. The Megacom investigation is not, nor should it be, addressing the development of alternative 800 Services for the OCCs.[13] Moreover, a determination of whether the Megacom offerings are just and reasonable should not be joined with further analysis of the competitive impact of AT&T's advantages in offering 800 Service. These types of "broad brush" matters are better handled in a rulemaking or other proceeding directly focusing on such issues, rather than through the tariff review process. MCI has offered no new facts or arguments regarding the lawfulness of the Megacom tariffs and its petition therefore is denied.

13. The US Telecom petition does not appear to identify possible additional issues for investigation. The petition merely expresses disagreement with our decisions to refrain from rejecting or suspending the tariff. Those decisions are not subject to reconsideration. Therefore, the US Telecom petition is dismissed.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by US Telecom, Inc. regarding the *Megacom Order* IS DISMISSED.

15. IT IS FURTHER ORDERED, that the petition for reconsideration filed by MCI Telecommunications Corporation regarding the *Megacom Order* IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Memorandum Opinion and Order, CC Docket No. 85-326, FCC 85-584, released Nov. 7, 1985 (*Megacom Order*). Unless otherwise noted, the term Megacom refers to both Megacom and Megacom 800 service.

[2] As a basis for our investigation, we directed the Common Carrier Bureau to request from AT&T information regarding actual Megacom revenue and demand to compare to its projections. *Megacom Order* at n. 19. This request will be based upon actual results under the Megacom offerings through October 31, 1986. Accordingly, this Order deals only with the petitions for reconsideration filed against the *Megacom Order*. The Bureau will issue its information request at a later date.

[3] AT&T's 800 Service is, like WATS, a toll service with a rate structure that tapers by call volume. Unlike WATS, however, under which subscribers originate calls to pre-selected geographic bands, 800 Service permits subscribers to receive and pay the charges for calls from such bands.

[4] In other words, MCI contends that the access cost savings that these customers can realize by using the Megacom services exacerbates AT&T's 800 Service monopoly and puts MCI at a competitive disadvantage in offering WATS-type service.

[5] In the interim, MCI suggests that in those instances in which an MCI point of presence (POP) is within five miles of an AT&T POP, the Commission require AT&T to provide free transport to the MCI POP to enable customers using high capacity access to access economically MCI's competing WATS-type service.

[6] It argues further that if resale is found to be effective, then AT&T has not shown the impact significant resale could have on Megacom's ability to recover its costs.

[7] In making this argument, the petitioner also suggests that the Commission inadequately balanced the negative effects of Megacom-generated bypass against the benefits of Megacom availability. We conclude that the petitioner has made no new arguments on the bypass issue warranting further investigation in the tariff review process.

[8] Section 1.106(a)(1) provides, in pertinent part, that a petition for reconsideration of an Order designating a case for hearing will be entertained, to the extent it relates to an adverse ruling regarding the petitioner's participation in the proceeding, but that petitions for reconsideration of other interlocutory actions generally will not be entertained.

[9] *See* Provision of Access for 800 Service, Notice of Proposed Rulemaking, CC Docket No. 86-10, 102 FCC 2d 1387 (1986) (*800 Access Rulemaking*).

[10] MCI also provides an example of the access cost savings that could accrue from a customer's bundling its WATS and 800 Service requirements and buying both Megacom services. *See* Reply of MCI to AT&T's Motion to Dismiss at 7.

[11] A limited category of decisions to deny a petition to reject is subject to judicial review and presumably would not be interlocutory for purposes of reconsideration proceedings. The peititions to reject the Megacom tariff did not fall within that category.

[12] This can occur, according to MCI, because high capacity access lines, such as T1, used for the closed end of Megacom services can be bundled together and used bi-directionally. Accordingly, the customer will need fewer access lines and realize lower access costs.

[13] The issues raised by MCI are already the subject of a Commission rulemaking. In a recent Order, we considered, *inter alia*, the question of interexchange carrier access to 800 Services and rejected the argument that AT&T's 800 Service data base should be made available to the OCCs. The Order also initiated a rulemaking which will consider the long-term 800 Service access obligations of exchange carriers that will best facilitate the competitive provision of 800 Service. *800 Access Rulemaking, supra* n. 9.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-346

In the Matter of

Amendment of Sections 43.51, 43.52, 043.53, 43.54 and 43.74 of the Commission's Rules To Eliminate Certain Reporting Requirements

REPORT AND ORDER

Adopted: November 12, 1986; Released: December 4, 1986

By the Commission:

I. INTRODUCTION

1. By a Notice of Proposed Rulemaking released November 21, 1985, this Commission proposed to revise Part 43 of its Rules, 47 C.F.R. Part 43, which concerns the filing of contracts and other reporting requirements pertaining to carriers' agreements and charges.[1] In our *Notice*, we tentatively concluded that certain reporting requirements were unnecessary and should be eliminated. Specifically, we proposed to amend the rules to eliminate the requirements that: (1) non-dominant carriers treated with forbearance file copies of certain contracts; (2) all carriers file reports of negotiations regarding foreign communication matters, reports regarding services not covered by a tariff, and reports of services rendered free or at reduced rates. Twelve parties filed comments and six parties filed replies in response to our Notice.[2] In this *Order*, we adopt the proposed rule revisions, with certain modifications as discussed below.

II. BACKGROUND

2. Section 211 of the Communications Act, 47 U.S.C. § 211, requires carriers to file with the Commission copies of contracts and agreements relating to communications traffic. In accordance with this Section, the Commission has the authority to require the filing of such contracts or exempt any carrier from such a requirement.[3] Under the authority of Section 211, Part 43 of our Rules currently requires carriers to file with the Commission material including contracts and concessions;[4] reports of negotiations regarding foreign communications matters;[5] reports regarding division of international telegraph charges;[6] reports regarding services performed by telegraph carriers;[7] and reports of services rendered free or at reduced rates.[8] We tentatively determined in the Notice that, in light of policies announced in the *Competitive Carrier Rulemaking*,[9] which reduced or eliminated unnecessary regulatory burdens on non-dominant common carriers, some of the data reported pursuant to the above-referenced sections was no longer useful and, therefore, that the routine filing of such data should no longer be required.

3. We tentatively concluded in the *Notice* that the same reasons supporting the policies adopted in *Competitive Carrier* justify elimination of the requirement that non-dominant carriers treated with forbearance file certain reports and contracts.[10] We decided that these documents were no longer useful to our staff in the performance of monitoring activities. Moreover, this Commission would, of course, retain authority to require the filing of such information if it became desirable at some point in the future. The lack of interest in the reports on the part of the general public over the past several years supported our conclusion that the data were no longer useful and, therefore, should no longer be routinely filed with us. We determined that if any party were to demonstrate that a category of non-dominant carrier contracts is not "minor" within the meaning of Section 211(b), we would consider requiring affected carriers to retain such contracts on file in their offices.[11]

4. Inasmuch as the negotiations concerning foreign communications that result in contractual arrangements are reflected in the contracts themselves, which must be filed or made available to the Commission upon request, we tentatively concluded that the filing of reports of such negotiations failed to serve any useful purpose.[12] We also tentatively decided to eliminate the requirement that telegraph carriers file reports regarding the services they perform and the requirement that carriers file reports of noncommercial educational television or radio services rendered free or at reduced rates. We tentatively concluded in the *Notice* that reports filed by telegraph carriers and reports regarding noncommercial educational television or radio services were no longer useful to the Commission staff. Moreover, we reasoned that elimination of the reporting requirements would make the treatment of telegraph and non-telegraph carriers more equitable.[13]

III. COMMENTS

5. MCI, the only party generally opposed to the proposed revisions, argues that this Commission lacks statutory authority to exempt common carriers from filing contracts entered into with other carriers. It argues that the exemption authority conferred by the second clause of Section 211(b) of the Communications Act, 47 U.S.C. § 211(b), relates only to the first clause of that subsection. Accordingly, MCI argues, Section 211(a) imposes an unqualified burden upon common carriers to file the contracts specified in the Commission's Rules.

6. While the remaining comments filed in response to the *Notice* generally support this Commission's proposals, several commenters suggest modifications of the proposal.[14] For example, some commenters argue that, rather than limiting application of the proposed revisions to non-dominant carriers treated with forbearance, the revised reporting requirements should apply to all non-dominant carriers, including those subject to streamlined regulatory treatment.[15] An additional modification suggested by the commenters relates to Sections 43.51(a)(2) and 43.51(e), which currently require that, with the exception of certain agreements "between subject telephone carriers and connecting carriers," carriers must file specified contracts and agreements with this Commission. The proposed revision of Section 43.51 removes this exception. Several parties argue that proposed Section 43.51 thus would actually impose upon carriers additional reporting requirements with respect to contracts that, under current rules, are retained on file in carrier offices.[16]

7. Another modification of the Commission's proposal urged by commenters is retention of the requirement that all carriers file copies of contracts pertaining to foreign communications with an exemption for non-dominant carriers treated with forbearance.[17] One commenter suggests that the Commission retain the requirement that agreements and reports of negotiations with foreign governments related to settlement and accounting rates for international telecommunications traffic be filed.[18] Another commenter urges the Commission to modify the proposed rules to require carriers providing international telecommunications to disclose contracts and concessions granted by foreign telecommunications entities and governments.[19] These parties argue that the modifications they suggest are necessary to effectuate this Commission's policy to develop a competitive international marketplace, to implement uniform settlements and accounting rates on parallel international routes and to protect the United States' interest in dealing with foreign entities.[20]

IV. DISCUSSION

8. Notwithstanding MCI's argument to the contrary, we find that the Communications Act gives this Commission authority to make the proposed revisions. Section 211(a) of the Act provides: Every carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party. Section 211(b) provides:

> The Commission shall have the authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

9. MCI argues that the second clause of Section 211(b) gives the Commission authority only to exempt carriers from filing the contracts which the Commission might require pursuant to the first clause of that subsection. MCI's interpretation of Section 211(b) would thus allow a filing exemption only with respect to those contracts which the Commission need not have required to be filed *ab initio*. Under such an interpretation, the exemption clause of Section 211(b) would not extend the Commission's authority beyond what it already has under the first clause of subsection (b), since the Commission could effectuate an exemption simply by not imposing a filing requirement in the first place. Because it renders the second clause superfluous and fails to follow time-honored rules of statutory construction requiring that statutes be reasonably construed and that no part be rendered inoperative, we are not persuaded that MCI's reading of the statute is the correct one. *See, e.g.*, American Tobacco Co. v. Patterson 456 U.S. 63, 71 (1981). *See also*, 2A Sutherland, Statutory Construction § 46.06 (rev. 3d ed. 1973).

10. A more accurate interpretation of the statute is that the first clause of Section 211(b) authorizes this Commission to require the filing of contracts other than those required by Section 211(a), while the second clause authorizes this Commission to exempt the filing of any contract it determines to be minor, even if the filing requirement stems from Subsection (a) of Section 211.[21] We find, therefore, that the statute affords this Commission the discretion to exempt carriers from filing contracts, including those referred to in Section 211(a), when we determine that those contracts are of minor significance to the regulatory scheme. Accordingly, we will adopt the proposals in the *Notice* with the modifications discussed below.

11. The *Notice* proposes to eliminate the contract filing requirements for non-dominant carriers treated with forbearance. As several commenters note, however, proposed Section 43.51, as set forth in the Appendix to the *Notice*, provides that "any communications common carrier engaged in domestic or foreign communications, or both, which has not been classified as non-dominant pursuant to Section 61.12(e) of the Commission's Rules" must file copies of the contracts specified by that Section.[22] This, as noted by the commenters, would extend the proposed filing and reporting exemptions to non-dominant carriers subject to streamlined regulation as well as those subject to forbearance. While several of the commenters urge us to so extend the filing exemption, we decline to do so. Our intent in revising Section 43.51 was to eliminate the filing requirements for forborne non-dominant carriers in order to limit the routine filing of contracts that are not useful to us in the performance of our monitoring duties. Because the material filed by carriers subject to streamlined regulations may be useful in the performance of monitoring, we are not persuaded that such carriers should be relieved of the requirement that contracts be filed. We therefore revise Section 43.51 to clarify that only non-dominant carriers treated with forbearance are not required to file contracts.[23]

12. As discussed above, several commenters have observed that revised Section 43.51(a)(1) would require the filing of certain contracts between subject telephone carriers and connecting carriers which are not currently required to be filed. The parties argue that, as proposed Section 43.51(a)(1) is now worded, dominant carriers would be required to file any contracts entered into with connecting carriers. This result, according to these commenters, would increase rather than decrease filing responsibilities and would impose unnecessary administrative burdens on carriers as well as on this Commission. We agree. Since our intent is to reduce unnecessary routine reporting and unnecessary administrative burdens, we will modify the proposed section to continue the exemption now allowed by existing Section 43.51(a)(2).[24]

13. Several commenters maintain that eliminating the reporting requirement for negotiations involving foreign communications matters would reduce our ability to implement the policies supporting uniform settlements and accounting rates on international routes and competition in the international telecommunications marketplace. We find, however, that because this Commission will continue to require all carriers to file all contracts and agreements resulting from such negotiations and to file, within 30 days, reports on international toll arrangements,[25] our ability to effectuate international rate policies and competitive provision of services will not be hampered. Thus, because we shall retain the requirement that carriers file reports of international toll communications arrangements, we are not persuaded by arguments opposing the elimination of the filing requirement for negotiation reports. Accordingly, we shall adopt the proposal to eliminate the requirement that reports of negotiations be filed.

14. Finally, no party disputes our proposal to eliminate the filing requirements of Sections 43.74 and 43.54 related to reports of services not covered by a tariff, services rendered free or at reduced rates and services performed by telegraph carriers. We find that elimination of these requirements is warranted, and we therefore adopt our proposal to delete Sections 43.54 and 43.74.

VI. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, in accord with Sections 2(a), 4(i), 4(j), 201-205, 211, 218, and 220 of the Communications Act of 1934, 47 U.S.C. §§ 152(a), 154(i), 154(j), 201-205, 211, 218, and 220, that Part 43 of the Commission's Rules and Regulations, 47 C.F.R. Part 43, is amended as specified in Appendix A to this Order.

16. IT IS FURTHER ORDERED that the Secretary shall cause a summary of this Report and Order to be published in the Federal Register.

17. IT IS FURTHER ORDERED that these amendments shall be effective February 9, 1987. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980. This reduction in the information collection burden the Commission imposes on the public is subject to the approval of the Office of Management and Budget as prescribed by the Act.

18. IT IS FURTHER ORDERED that CC Docket No. 85-346 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX A

PART 43 – [AMENDED]

The Authority for Part 43 continues to read:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 211, 219, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220, unless otherwise noted. Part 43, Title 47, Chapter 1 of the Code of Federal Regulations is amended as follows:

1. Section 43.51 is revised to read:

§ 43.51 Contracts and Concessions

(a) Any communications common carrier engaged in domestic or foreign communication, or both, which has not been classified as non-dominant pursuant to Section 61.12(e) of the Commission's Rules, 47 C.F.R. § 61.12(e), is not treated under the regulatory forbearance policies established by the Commission, and which enters into a contract with another carrier must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization or other arrangement to which it is a party and amendments thereto with respect to the following: (1) the exchange of services; (2) except as provided in paragraph (c) of this section, the interchange or routing of traffic and matters concerning rates, division of tolls, or the basis of settlement of traffic balances; and (3) the rights granted to the carrier by any foreign government for the landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operations.

(b) If the agreement referred to in this Section is made other than in writing, a certified statement covering all details thereof must be filed by at least one of the parties to the agreement. Each other party to the agreement which is also subject to these provisions may, in lieu of also filing a copy of the agreement, file a certified statement referencing the filed document. The Commission may, at any time and upon reasonable request, require any communication common carrier classified as non-dominant and treated with forbearance, and therefore not subject to the provisions of this section, to submit the documents referenced herein.

(c) With respect to contracts coming within the scope of paragraph (a)(2) of this Section between subject telephone carriers and connecting carriers, except those contracts related to communications with foreign or overseas points, such documents shall not be filed with the Commission; but each subject telephone carrier shall maintain a copy of such contracts to which it is a party in appropriate files at a central location upon its premises, copies of which shall be readily accessible to Commission staff and members of the public upon reasonable request therefor; and upon request by the Commission, a subject telephone carrier shall promptly forward individual contracts to the Commission.

2. Section 43.52 is removed.

3. Section 43.53 is revised to read:

§ 43.53 Reports Regarding Division of International Toll Communication Charges

(a) Each communication common carrier engaged directly in the transmission or reception of communications between the United States and any foreign jurisdiction must file a report with the Commission within thirty (30) days of the date of any arrangement concerning the division of the total toll charges, including accounting rate, settlement rate and currency data, on such communications other than transiting. A carrier first becoming subject to the provisions of this section must, within thirty (30) days thereafter, file with the Commission a report covering any such existing arrangements.

(b) In the event that any change is made which affects data previously filed, a revised page incorporating such change or changes must be filed with the Commission not later than thirty (30) days from the date the change is made, provided, however, that any change in the amount of foreign participation in charges for outbound communications or in the respondent's participation in charges for inbound communications must be filed not later than thirty (30) days from the date the change is agreed upon.

(c) A single copy of each such report must be filed in a format that contains a clear, concise and definite statement of the arrangements.

4. Section 43.54 is removed.

5. Section 43.74 is removed.

FOOTNOTES

[1] Amendment of Sections 43.51, 43.52, 43.53, 43.54 and 43.74 of the Commission's Rules To Eliminate Certain Reporting Requirements, CC Docket No. 85-346, 102 FCC 2d 531 (1985) (*Notice*).

[2] The following parties filed comments: Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), Comsat International Communications, Inc. (Comsat), Equatorial Telecommunications Company (Equatorial), FTCC McDonnell Douglas International Telecommunications Company (FTCC), Hawaiian Telephone Company (HTC), MCI Telecommunications Corporation (MCI), Office of Management and Budget (OMB), Overseas Telecommunications Corporation (OTC), RCA Global Communications (RCA), TRT Communications Corporation (TRT), and Western Union Telegraph Company (WU). RCA's comments -- filed one day late -- were accompanied by a Motion to Accept Late-Filed Comments. We hereby grant RCA's motion and accept the comments as filed. Reply comments were filed by the American Telephone and Telegraph Company (AT&T), Equatorial, Mountain States Telephone and Telegraph Company, Northwest Bell Telephone Company and Pacific Northwestern Bell (US West), National Telecommunications Network (NTN), United Telephone Systems Inc. (UTS), and WU.

[3] *See* 47 U.S.C. § 211. See the discussion at paras. 4, 9-10, *infra*.

[4] Section 43.51 requires the filing of contracts between carriers for: (1) the exchange of services; (2) the interchange or routing of traffic and matters concerning rates and division of tolls; and (3) agreements with foreign governments.

[5] Section 43.52 requires the filing of a monthly report by each carrier engaged in foreign traffic covering all negotiations, whether written or oral, initiated during the previous month with any foreign administration or carrier.

[6] In accord with Section 43.53, carriers engaged in overseas telegraph communications are required to file a report describing the arrangements for division of tolls with the foreign countries involved.

[7] Section 43.54 requires telegraph carriers to file reports for services not covered by a tariff. Such services include, but are not limited to, communications services wholly within or between foreign countries, leasing arrangements concerning wires leased to other communication carriers, errand services by messenger, time service and burglar alarm services.

[8] In accord with Section 43.74, carriers must file reports of services rendered free or at reduced rates for noncommercial educational television or radio services.

[9] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980), Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), Second Report and Order, 91 FCC 2d 59 (1982), *recon.*, 93 FCC 2d 54 (1983), Second Further Notice of Proposed Rulemaking, FCC 82-187, released Apr. 21, 1982, Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983), Third Report and Order, Mimeo No. 012, released Oct. 6, 1983, 48 Fed. Reg. 46,791 (Oct. 15, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fourth Further Notice of Proposed Rulemaking, FCC 84-82, released Mar. 22, 1984, 49 Fed. Reg. 11,856 (Mar. 28, 1984), Fifth Report and Order, FCC 84-394, released Aug. 27, 1984, 49 Fed. Reg. 34,824 (Sept. 4, 1984), Sixth Report and Order, FCC 84-566, released Jan. 4, 1985, 50 Fed. Reg. 1215 (Jan. 10, 1985), *rev'd sub nom.* MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[10] In the *Competitive Carrier Rulemaking*, we defined non-dominant carriers as those carriers that, due to the presence of competition, lack any substantial ability to control prices in the marketplace or to engage in anti-competitive practices as proscribed by Sections 201-205 and 214 of the Communications Act. As to some non-dominant carriers, the Commission has not forborne from regulation but has streamlined the regulatory requirements. Under streamlined regulation, carriers are required to submit tariff filings on 14 days' notice, and are not required to obtain prior line-specific approval for domestic lines under Section 214 of the Act, 47 U.S.C. § 214. *See also* 47 C.F.R. §§ 61.12(c) and (e) for definitions of dominant and non-dominant carriers.

[11] *Notice*, 102 FCC 2d at 533.

[12] *Id.* at 534.

[13] *Id.* at 534-35.

[14] HTC and FTCC support the revisions as proposed. Other commenters propose modifications discussed herein.

[15] *See* Comments of Ameritech, Equatorial, OTC, RCA and WU and n.10, *supra*.

[16] *See* Comments of US West, Bell Atlantic, OTC and UTS.

[17] *See* Comments of Comsat, OTC, and RCA.

[18] *See* Comments of TRT.

[19] *See* Comments of OMB.

[20] OTC recommends that carriers engaged in foreign telecommunications services identify in their semi-annual reports the contracts and arrangements they have entered into within the preceding six months.

[21] As indicated in the legislative history supporting Section 211, "minor" contracts under Section 211(b) includes those referred to in Section 211(a) that the Commission determines are minor. *See* H.R. Report No. 1850, 73d Cong., 2d Ses. (June 1, 1934), at 6; Statement of Sosthenes Behn, Hearings before H.R. Comm. on Interstate and Foreign Commerce, 73d Cong. 2d. Sess., on H.R. 8301, April 10, 1934, at 227-228. *See also*, *Notice* at n.2 and accompanying text.

[22] *Notice*, Appendix A.

[23] *See* Appendix A. We note that the text of the *Notice* makes clear our intent to eliminate the filing requirements only for non-dominant carriers treated with forbearance. We further note that non-dominant carriers may be engaged in businesses which, in accord with *Competitive Carrier* policies, cause the carriers to be subject to both streamlined regulation and forbearance. Some carriers, for example, are subject to forbearance treatment for their domestic services and streamlined treatment for their international or other services. These carriers are required to file contracts in areas for which they are subject to streamlined regulation. They are exempt from the contract filing requirements for services as to which the Commission has forborne from regulation.

[24] This modification is reflected in § 43.51(a)(2), as shown in the attached Appendix. We note that the proposed rules delete existing Section 43.51(b). Because it reiterates the requirement

that carriers file reports of amendments already required to be filed under proposed Section 43.51(a), Section 43.53(b) is redundant. We therefore delete the subsection as proposed.

[25] *See* Appendix A, Section 43.53(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

K. U. T. E., INC.

For Construction Permit
and Waiver of 47 C.F.R. § 73.211(c)
Station KUTE(FM), File No. BPH-851104II
Glendale, California

ORDER

Adopted: November 14, 1986 Released: December 2, 1986

By the Commission: Commissioner Quello concurring in the result.

1. The Commission has before it for consideration an application for review filed on April 29, 1986, by K.U.T.E., Inc., seeking review of the Audio Services Division, Mass Media Bureau's denial (attached hereto) of a petition for reconsideration of the Bureau's dismissal of a request for waiver of 47 C.F.R. § 73.211(c) and of its denial of a construction permit application for Station KUTE(FM), Glendale, California.

2. KUTE's application for review simply restates the arguments made in its petition for reconsideration. We have reviewed the Bureau's action denying that petition and find no error. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), IT IS ORDERED that the application for review IS DENIED.

3. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send by Certified Mail - Return Receipt Requested, a copy of this Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico,
Secretary

APPENDIX

March 17, 1986

Irving Gastfreund, Esq.
Finley, Kumble *et al.*
1120 Connecticut Avenue, Northwest
Washington, D.C. 20036

Re: KUTE, Glendale, California

K.U.T.E., Inc.

Application for Construction
Permit, File No. BPH-790726AO;
Petition for Reconsideration; and
Resubmitted and Amended Application
for Construction Permit,
File No. BPH-851104II

Dear Mr. Gastfreund:

On November 4, 1985, you filed both the instant petition for reconsideration ("petition") and amended application for construction permit on behalf of K.U.T.E., Inc. ("K.U.T.E."), licensee of KUTE-FM, Glendale, California. The underlying application was originally filed on July 26, 1979 by Inner City Broadcasting Corporation ("Inner City"), assignor of the license of KUTE to K.U.T.E. In that application, and in the instant petition and resubmitted application, the parties have sought and continue to seek authority to modify KUTE's licensed facility. The modification sought would allow KUTE to reacquire its former status as a superpower Class B facility and would entail waiver of 47 C.F.R. § 73.211(c), which specifies the maximum power and height limitations for new and existing stations. Prior actions by the Commission's staff--including the return of the subject application--have been based on a holding that Inner City's predecessor in interest, Robert D. Adams ("Adams"), relinquished that status by filing and prosecuting to grant an application specifying reduced operating parameters, albeit ones conforming to the maximum for Class B per 47 C.F.R. § 73.211.

Before addressing the merits of the petition, a factual summary is in order. KUTE's operating parameters were an effective radiated power ("ERP") of 82 kW and a height above average terrain ("HAAT") of 620 feet (189 meters) from 1952 to early 1969. Adams operated the station from a site adjacent to Flint Peak in Glendale, the community of license, by virtue of a lease given by the site owner, the City of Glendale ("the City"). The lease expired in 1968, and the City refused to renew it. Adams attempted to secure nearby sites, but those efforts are said to have failed because of his inability to secure zoning approval for one site and his inability to pay the rent demanded for another. Adams accordingly filed an application for authority to relocate KUTE to Mount Wilson and to radiate 3 kW at 2805 feet (855 meters), parameters somewhat greater than those authorized at the then licensed site.

The Commission's staff returned that application as unacceptable for filing in November, 1968 because superpower stations are prohibited by 47 C.F.R. § 73.211(d), currently § 73.211(c), from increasing their ERP or extending their 1 mV/m contour beyond that of their licensed facilities. The staff letter, Exhibit 3 to your petition, also noted that the application would be acceptable, if resubmitted and amended, *inter alia*, to specify an ERP of 0.670 kW. That power level corresponded to maximum Class B parameters at the time for an HAAT of 2805 feet (855 meters), pursuant to 47 C.F.R. § 73.211(b) and the derating method set forth in the U.S.-Mexican Agreement. That letter also noted that the predicted coverage of the community of license would be more than adequate ("in excess of 3.16 mV/m") in light of the demands of 47 C.F.R. § 73.315.

Rather than seek staff reconsideration or Commission review of that action, Adams filed an application proposing to radiate 0.640 kW from an antenna on Mount Wilson with an HAAT of 2860 feet (872 meters). Your petition alleges that Adams chose this course of action due to the pressing need to relocate KUTE--the City "was literally at the door with a bulldozer as Mr. Adams moved" from his licensed site--and due to the station's poor financial condition and Adams' lack of professional engineering and legal assistance. The Commission's staff granted this latter application on April 23, 1969.

The license of KUTE was assigned to Inner City on February 2, 1979. On July 26, 1979, Inner City filed the underlying application for construction permit by which it sought to increase KUTE's operating parameters at its Mount Wilson site to 10 kW ERP and 2775 feet (846 meters) HAAT. Grant of Inner City's application would have also entailed waiver of § 73.211, and such was requested. On September 25, 1985, the Chief, FM Branch, denied that request and dismissed Inner City's application on the grounds that the application proposed greater than maximum Class B operating parameters in violation of the Rules, and that Inner City's predecessor in interest (Adams) had relinquished KUTE's superpower status. The Branch Chief's letter held that "when KUTE reduced its facilities to Class B maximum, it forfeited the right to increase back to the equivalent of those licensed in the past." The instant petition seeks reconsideration of that holding and of the dismissal of Inner City's underlying application. By means of the resubmitted, amended application, K.U.T.E. seeks authority to operate the station from Mount Wilson with an ERP of 2.36 kW and an HAAT of 850 meters.

In support of K.U.T.E.'s position, you advance the following arguments.

(1) Inner City never *voluntarily* relinquished its grandfathered superpower status. You allege that Adams lacked sufficient funds to retain professional engineering or legal help to contest the staff's return of his original site-change application and that he was forced to undertake an immediate move of the facility. You thus posit that these pressures prevented Adams from exercising a *voluntary* choice;

(2) It is inequitable for KUTE to operate at parameters equal to the maximum for Class B because its reduced-power status precludes it from adequately and competitively serving its community of license. This, you suggest, is contrary to the public interest; and

(3) While the Commission's staff correctly held Adams' original proposal to be "inconsistent with the Commission's Rules," it incorrectly interpreted former § 73.211(d) as evidenced by the Commission's later holding in *Sutro Tower, Inc.*, 32 FCC 2d 826 (1972); and that upon receipt of this incorrect interpretation, Adams reasonably concluded that the only proposal which would be acceptable to the Commission was one which specified minimum Class B facilities.

As to the first of your arguments, we believe that neither the factual record nor the cases you have cited warrant the conclusion that Adams' acts were "involuntary." The three cases you have cited are not controlling, nor do they suggest a conclusion contrary to our prior and present holdings in this factual setting. Furthermore, there is precedent beyond these cases which calls for affirming the Branch Chief's prior holding. Neither *Nation Wide Cablevision, Inc.*, 49 FCC 2d 1138 (1974), *Community Cablevision Corporation*, 50 FCC 2d 988 (1975), nor *Bainbridge Video, Inc.*, 40 RR 2d 1435 (Cab. Bur. 1977) dealt with a broadcaster's site relocation or site relocation entailing an apparent relinquishment of grandfathered, superpower status. Rather, they each involved situations in which a cable system's grandfathered status vis-a-vis the then "may-carry" rules was at issue. None of these cases, we believe, presented fact patterns sufficiently analogous to the instant case to be dispositive.

In both *Nation Wide* and *Community*, the Commission held that a cable system operator could renew carriage of a deleted station when deletion had occurred due to circumstances "beyond the systems' control." The Commission deemed the technical difficulties with reception quality which caused such deletion to be outside the cable systems' ambit of control and, consequently, determined that revived "grandfathered" carriage was appropriate.

However, *Bainbridge* presented the Commission with an argument for grandfathering more analogous to that presented here. Bainbridge sought authority for renewed, grandfathered carriage of a discontinued station, alleging discontinuance to have resulted from its inability to finance nonduplication protection. The Commission held this argument to be predicated upon a "voluntary" discontinuance rather than an "involuntary" deletion and refused grant of grandfathered status.

Clearly, none of these cases but *Bainbridge* speak to the consequences of Commission action prompted by a licensee's *own* actions.[1] All but *Bainbridge* involved external circumstances beyond the cable operator's control. Only *Bainbridge* provides a pattern of alleged economic hardship as in the instant case. There, however, the Commission decided against revival of grandfathered status.

The Commission has not in the past, even in cable grandfathering cases of the type on which you rely, found allegations of economic hardship persuasive.[2] Furthermore, we believe that if Adams could not "carry on his livelihood without the radio license at stake in the proceeding," he could have proceeded on his own behalf, and without professional engineering assistance, in a manner akin to *in forma pauperis*. *Cf.* 47 C.F.R. § 1.224.

Finally, you have not established that the urgency of Adams' move to Mount Wilson was due to circumstances beyond his control. Adams certainly knew in advance the expiration date of his site lease and knew or should have been aware that the lease might not be renewed. Therefore, he could and should have made contingency plans.

In addition, we are not persuaded that Adams exhausted his other available options. Adams could have requested--while contesting the return of his original application, without prejudice to the merits of that matter, and pursuant to 47 C.F.R. § 73.1635--special temporary authorization to operate with parameters the Commission's staff had indicated would be acceptable. Adams did not do so. Rather, Adams acquiesced in the staff action and through his acquiescence that action became final. An applicant who represents himself assumes the risk and cannot rely on inexperience or lack of knowledge of procedure to excuse his conduct or to avoid the consequences of his own actions or inactions. *Western Broadcasting Company*, 1 RR2d 732 (1963); *Garo Ray*, RR2d 399, 405 (1964); *Simon Geller*, 25 RR 828 (1963). In sum, I find no justification for upsetting the Branch Chief's determination that Adams' relinquishment of KUTE's grandfathered status was voluntary.

You next argue that if we do not permit the requested upgrading of KUTE and grant a waiver of § 73.211, we will be acting in a manner inconsistent with the public interest. This argument is premised on an allegation that the station lacks sufficient ERP and HAAT to adequately serve Glendale and effectively compete with any of the 16 other FM stations in the Los Angeles area. Engineering statements appended to your petition allege that 51% of the area of the community of license, in which 50% of Glendale's population resides, is subject to shadowing by terrain obstructions. No showing, however, via measurements per 47 C.F.R. § 73.314, has been made that existing city-grade service is inadequate. Rather, the "Statement of Edward Edison, Consulting Engineer," which is appended to the resubmitted application, relates that KUTE's relative signal strength in central Glendale as computed for the pertinent signal-path depression angle is 7.9 mV/m or 78 dBu. Statement at 2. Assuming, *arguendo*, that this prediction of service is accurate, it describes a signal level fully eight decibels in excess of what 47 C.F.R. § 73.315(a) requires. Even where measurements taken in conformity with § 73.314 show that only 50% of the community of license receives service greater than or equal to 70 dBu, existing city-grade coverage cannot be termed "inadequate." *GreaterMedia, Inc.*, 61 FCC 2d 692 (1976).

Your pleading also contains engineering allegations that KUTE's signal level in central Glendale is lower than the levels of service provided by other FM stations in the area. You fashion an argument based on these allegations that KUTE is entitled to superpower parameters. This argument is of insufficient weight to allow KUTE to reacquire *any* of its former, superpower status. The resulting detriment to the public interest and the need for finality of Commission or staff actions taken so long ago[3] are simply too overwhelming to offset any advantage that would be derived from granting your request. Obviously, private economic considerations cannot enter into our deliberations in such matters.

The Commission has consistently refused to allow stations that have given up part or all of their superpower status (or later applicants for the facilities of lapsed stations) to subsequently reacquire any part of that status. *WHUT Broadcasting, Inc.*, 22 FCC 2d 954 (1970); *Independent Music Broadcasters, Inc.*, 38 RR 2d 1539 (1976); *Peoples Broadcasting Corporation*, 68 FCC 2d 1570 (1978). We have also followed a strong policy, codified in 47 C.F.R. § 73.211(c), of not allowing superpower stations that must make facilities modifications to extend their 60-dBu contours beyond those currently authorized. *WGN Continental Broadcasting Company*, 17 FCC 2d 1009 (1969); *Sutro Tower, Inc., supra*.

This policy has also been followed in noncommercial educational FM contexts. *Moody Bible Institute of Chicago*, 45 RR 2d 109 (1979), which you cite, does not compel a different result. Moody's application BPED-2001 sought to relocate WMBI, an educational FM station with superpower facilities, from its licensed location west of Chicago to the top of the John Hancock Center in that city's downtown area. Moody thereby sought to increase its HAAT from 440 feet (134 meters) to 1290 feet (393 meters), while retaining its licensed ERP of 100 kW. Grant of the application would have increased Moody's 60-dBu contour by more than 57%. By letter of February 6, 1979 (*Moody, supra*), we afforded to Moody a 30-day period within which to amend its application to specify a combination of ERP and HAAT consistent with our maximum-power rules and policies, and one in no event greater than then authorized. Moody failed to so amend, and its application was dismissed by letter of April 28, 1981. Moody thereupon filed a petition for reconsideration. After the termination of rulemaking Docket 20735 by the *Memorandum Opinion and Order*, 50 Fed. Reg. 27954 (1985), we acted upon Moody's petition. In our letter of December 20, 1985, we noted that the *Memorandum Opinion and Order, supra*, had eliminated the previous possibility, per 47 C.F.R. § 73.511 as it formerly read, of granting applications proposing parameters exceeding the power and height maxima set forth in § 73.211. As amended by the Commission's action in Docket 20735, § 73.511 provides to educational applicants no exceptions to the limitations found in § 73.211. Moody's petition for reconsideration was accordingly denied.

Your third and final contention is that the Commission's 1968 action incorrectly interpreted § 73.211(d) (now (c)) and was inconsistent with our later action in *Sutro Tower, Inc., supra*. In subsequent discussions with members of the Commission's staff, you further allege that based upon this erroneous interpretation, Adams reasonably concluded that he was *required* to file for maximum Class B facilities so as to avoid being forced off the air. I disagree. In reviewing the Commission's 1968 action, I find no error in the interpretation of § 73.211(d) (now (c)). The 1968 letter correctly stated that a superpower station "will not be authorized changes in facilities which *extends* the location of the 1 mV/m field strength contour beyond that of the present authorization in any direction." (emphasis added). The clear implication of this statement is that a proposal which would not extend the 1 mV/m contour could be authorized and the fact that the Commission did not affirmatively state this fact does not constitute, as you suggest, an erroneous interpretation of the rule.

Accordingly, I affirm the staff's interpretation and application of § 73.211(d) (now (c)) and find your argument based on *Sutro* inapposite. *Sutro* was decided more than four years after the staff's rejection of Adams' original Mount Wilson proposal. Furthermore, the *Sutro* doctrine has no application here even were it extant in 1968.[4] *Sutro* did, however, articulate Commission policy regarding § 73.211 waivers. We noted there that a general relaxation of the waiver standard would produce chaos, and would ultimately cause other FM licensees across the country to seek to gain or reacquire grandfathered status. Such a result would not only have shaken the entire FM

allocation scheme to its roots, but would also have ultimately violated 47 U.S.C. § 307(b). "[I]t would frustrate our statutory objective to provide a fair, efficient and equitable distribution of radio service throughout the country." *Id.* at 829.

You have failed to show that reconsideration of the prior staff action or grant of the requested waiver of 47 C.F.R. §73.211(c) is warranted. Accordingly, IT IS ORDERED, That the petition for reconsideration filed on behalf of K.U.T.E., Inc., IS DENIED. IT IS FURTHER ORDERED, That the resubmitted and amended application for construction permit, File No. BPH-851104II, of K.U.T.E., Inc., IS RETURNED as unacceptable for filing. Our action here is taken pursuant to authority delegated by 47 C.F.R. § 0.283.

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Indeed, in those cable cases which do concern requests for Commission action made necessary by cable operators' own business decisions, the Commission has not recognized grandfathering rights or permitted their reacquisition. *See generally Central Plains Cable TV, Inc.*, 51 FCC 2d 904 (1975); *Service Electric Cable TV, Inc.*, 57 FCC 2d 334 (1975); *Clearview TV Cable of Encumclaw*, 64 FCC 2d 897 (1977), *recon. den.*, 69 FCC 2d 1179 (1978); *Lima Cablevision Co.*, 52 FCC 2d 1016 (1974).

[2] *See Lima Cablevision Co., supra*, wherein a cable operator, whose Lima, Ohio system was carrying grandfathered signals, was not permitted to carry otherwise prohibited signals over its system in Elida, Ohio. The operator's allegations of economic hardship were deemed unpersuasive.

[3] *Cf. Inre Petition of Radio Para La Raza*, 40 FCC 2d 1102, 1104 (1973). "The courts have noted a strong policy in favor of administrative finality, and have held that proceedings that have become final will not be reopened unless there has been fraud on the agency's or the court's processes, or unless the result is manifestly unconscionable. *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944); *Greater Boston Television Corporationv. FCC*, 463 F.2d 268 (D.C. Cir. 1971); KIRO, Inc. v. FCC, 438 F.2d 141 (D.C. Cir. 1970)." Adams forfeited KUTE's grandfathered, superpower status long ago. That forfeiture is now beyond review in light of the strong policy set forth by Congress in 47 U.S.C. § 405.

[4] Sutro Tower, Inc., a joint tower company formed in the 1960's, sought a declaratory ruling to allow most FM stations serving the San Francisco area already operating from Mount Sutro to use its tower and to allow a limited number of stations not then situated on Mount Sutro to relocate and place their antennas on that tower. The Commission allowed such and granted the relocating stations limited waivers of then § 73.211(d) so as to recenter their 60-dBu contours about Mount Sutro but not to ext end them any further. Grandfathered, superpower stations already situated on Mount Sutro--but not on the company's tower--were permitted to mount their antennas on the tower. However, they were required to reduce their levels of ERP to confine their 60- dBu contours within their previously authorized bounds. As stated earlier, Adams' proposal did not comport with the pertinent Sutro requirements and arose in a markedly different factual setting.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application

THE OHIO BELL
TELEPHONE COMPANY File No. W-P-C-5800

For authority pursuant to Section 214 of the Communications Act of 1934, and Section 63.01 and 63.57 of the Commission's rules and regulations to construct and maintain broadband transport facilities in Cleveland, Ohio.

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: November 13, 1986 Released December 1, 1986

By Chief, Common Carrier Bureau:

1. Before the Bureau is the above-captioned application filed by the Ohio Bell Telephone Company (Ohio Bell or Applicant) pursuant to Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, and Sections 63.01 and 63.57 of the Commission's rules and regulations, 47 C.F.R. §§ 63.01 and 63.57. Ohio Bell seeks authority to construct and maintain broadband cable/fiber optic facilities for its customer, North Coast Cable Limited (NCC), the Cleveland, Ohio cable television franchisee. The application appeared on public notice June 25, 1986. A petition to deny the application was filed by Metropolitan Cablevision, Inc. (Metropolitan), a provider of video programming in Cleveland through the use of Instructional Television Fixed Service (ITFS) facilities.[1] Ohio Bell filed an opposition. For the reasons set forth herein we grant the application.

I. APPLICATION

2. The proposed facilities will be constructed entirely within the city of Cleveland and will be used to connect NCC's headend cable television facilities with Applicant's headend/hub and six other hub sites throughout Cleveland.[2] Applicant's hub sites will be interconnected with fiber optic facilities and from these hubs coaxial distribution facilities will be employed to serve Cleveland's residences and other buildings. In addition, Ohio Bell seeks authority to install an institutional network for NCC that will serve public, educational, governmental and private businesses within the city. The proposed system consists of approximately (a) 1100 route miles of coaxial broadband distribution facilities; (b) 25 miles of fiber optic cable; (c) seven hubbing sites; and (d) another 200 miles of coaxial cable for the institutional network. According to Ohio Bell this arrangement will provide subscribers 79 channels of video programming (plus FM service) and four return channels. Pursuant to an agreement between NCC and Ohio Bell, NCC has an option to purchase the broadband transport facilities (exclusive of the hubs and hub/interconnect network), an option it has decided to exercise. As a result, after the system is constructed Ohio Bell will retain its hubs and hub/interconnect network which will be offered to NCC on a common carrier basis under a tariff to be filed with the Commission and lease to NCC pole attachment rights and conduit space pursuant to its state tariff, P.U.C.O. No. 1.

II. PLEADINGS

3. In its petition, Metropolitan argues that there are four critical distinctions between Ohio Bell's proposal and other Commission approved channel service proposals which compel Commission denial of the subject construction application. First, Metropolitan contends that Ohio Bell's financial arrangement with NCC violates the Commission's telephone/cable television cross-ownership rules by creating a debtor-creditor relationship between them.[3] The complicated system of charges encompassed by the Ohio Bell-NCC agreement is nothing more than a disguise for loans to NCC, according to Metropolitan.[4]

4. Second, Metropolitan alleges that Ohio Bell does not propose adequate protection against cross-subsidization of its proposal by its monopoly ratepayers. Much of Metropolitan's allegation is based on Applicant's purported plan to co-locate most of the cable facilities and electronics within its existing telephone plant and to use existing personnel. This arrangement, Metropolitan charges, affords Ohio Bell the chance to conduct anticompetitive cost shifting virtually without detection to the detriment of telephone subscribers and service competitors. Moreover, Ohio Bell has incurred expenses readying its bid for NCC's contract, expenses Metropolitan assumes are being paid by monopoly ratepayers. In addition, Ohio Bell's agreement to allow NCC to defer payment of a significant portion of Ohio Bell's monthly charge amounts to a subsidy which Metropolitan alleges will be absorbed by monopoly ratepayers.

In view of these potential anticompetitive practices, Metropolitan argues that the recordkeeping methods Ohio Bell has offered as safeguards are inadequate and recommends that Ohio Bell be required to comply with the interim cost allocation procedures adopted in the *Third Computer Inquiry*.[5]

5. Metropolitan also alleges that Ohio Bell's proposal violates Section II (D) of the *Modification of Final Judgment* (MFJ)[6] because Ohio Bell has granted NCC an option to purchase outright the broadband facilities. NCC would hold equitable and legal title to the facilities, in which case Ohio Bell would be constructing and selling communications equipment and not offering exchange telecommunications, exchange access or a natural monopoly service regulated by tariff as required by the MFJ. Therefore, Metropolitan insists, before Ohio Bell can engage in this activity it must obtain a business waiver from the court overseeing the MFJ.

6. Finally, Metropolitan charges that because Ohio Bell also provides telephone service in Cleveland the proposal puts Ohio Bell in a position to monopolize a variety of markets in the area. Thus, it may have incentives to hamper the ability of NCC to provide competing data services by constructing an inferior cable distribution system and providing poor maintenance service. In addition, the application offers no assurance that Ohio Bell's control over the system will not be abused as NCC seeks to add more advanced technological functions to the system.[7] These and other cited potential anticompetitive acts Metropolitan claims warrant denial of the application.

7. In response, Ohio Bell contends that Metropolitan is not "party in interest" as required by Section 63.52(c) of the rules, 47 C.F.R. § 63.52(c) for one filing a petition to deny. In its view, Metropolitan fails to make a *primafacie* case that grant of the subject application would lead to a derogation of service to the public. *See WLVA, Inc. (WLVA - TV,) Lynchburg, Virginia v. F. C. C.*, 454 F.2d 1286, 1297 (D.C. Cir. 1972). Nor does Metropolitan demonstrate it will suffer any adverse economic harm as a result of NCC proposed operation, Ohio Bell asserts. Given that Metropolitan's petition is unsupported by the required affidavit, Ohio Bell argues that "it fails on its face to show that the petitioner is a 'party in interest' and [therefore] should be dismissed."

8. Ohio Bell disagrees with Metropolitan's characterization of its payment arrangements with NCC as a series of loans, and considers the issue moot because NCC has elected to exercise its option to purchase the broadband transport facilities. Under the terms of its contract, the facilities Ohio Bell retains, *viz.*, the hubs and interconnecting fiber optic facilities, will be subject to construction and continuing maintenance charges provided under tariff. Therefore, Ohio Bell concludes that its relationship with NCC is not violative of Sections 63.54 - 63.55 of the rules.

9. While maintaining that there are adequate safeguards against cross-subsidization, as outlined in its application, Ohio Bell avers that a separate accounting system is already in place and operating and is being used to account for all expenses related to this project. Should the Commission find this to be insufficient it can order other measures and Ohio Bell will comply, Ohio Bell states. (Additionally, Ohio Bell notes, the facilities constructed for NCC will be fully "dedicated" and maintained by a "dedicated" work force.) Applicant further argues that the Commission did not intend to require telephone companies to employ the interim cost allocation procedures of the *Third Computer Inquiry*, *supra*, to broadband transport facilities. To require such an exercise, in contrast to requirements set forth in other cases, would serve as a barrier to market entry.

10. Ohio Bell argues that the MFJ concerns expressed by Metropolitan were addressed previously by the Commission, and decided adversely to Metropolitan's position. Relying on *Chesapeake and Potomac* (C&P), FCC 85-48, released January 30, 1985, *recon. denied*, FCC 85-279, released May 30, 1985, Ohio Bell states that the Commission has approved of a CATV company enjoying all property rights in a common carrier's broadband distribution facilities except bare legal title. According to Ohio Bell, in *C & P* the petitioners had argued that the proposal was a turnkey construction plan, a matter outside of the Commission's jurisdiction and violative of the MFJ. Nevertheless, Ohio Bell observes, the Commission found it had jurisdiction because the proposal contained essential features included in channel service offerings made by other carriers.

11. Ohio Bell notes that in *C & P*, the Commission deferred to the Department of Justice (DOJ) which later ruled (notwithstanding transfer of equitable title to the customer) that the telephone company (C&P) was providing exchange telecommunications service and therefore did not require a waiver.[8] In addition, Ohio Bell cites Commission approval of Pacific Bell's application which also provided an option to purchase the cable distribution facilities by the cable franchisee.[9] Based on these precedents, Ohio Bell concludes that the Commission has jurisdiction to issue a Section 214 authorization and petitioner's MFJ argument should be rejected.

12. Finally, Applicant does not believe Metropolitan has demonstrated that its construction and maintenance agreements with NCC are anticompetitive. Pointing out that there is no support for Metropolitan's imagined threats to NCC's viability, applicant argues that NCC and, ultimately, the city of Cleveland control the design of the cable network, which includes facilities for advanced two-way communications. Moreover, it argues, the franchise agreement requires a set level of maintenance performance, and since it does not dominate the data market in the Cleveland area there is no motive for it to deliberately impede NCC's progress through substandard maintenance performance. Additionally, concern regarding Ohio Bell imposing unreasonable maintenance charges is unwarranted given that such rates must be approved by the Commission through tariff review, it argues. Applicant also notes that any termination of service to NCC would be by governmental order after a demonstration that it would be consistent with the public interest. Finally, Ohio Bell states that the pricing of new services is a function of many complex technological and marketplace variables. Its responsibility here is only to assure that its rates are just and reasonable. "[G]uaranteeing profitability of the cable operator is beyond the scope of this proceeding." Ohio Bell opposition, 18.

13. In response, Metropolitan urges that Applicant's challenge to its standing is just an attempt to avoid substantive issues. According to Metropolitan, it is well settled that a competitor may petition to deny a Section 214 application,[10] and no one disputes that Metropolitan offers video entertainment services in Cleveland or that Ohio Bell's proposed facilities will be used to offer the same type of services to the same community of interest. Therefore, Petitioner argues, there is no need to document economic injury as claimed by Ohio Bell.

14. Because NCC has decided to exercise its purchase option now, Metropolitan now argues that the financial viability of NCC must be reviewed by the Commission prior to grant of Ohio Bell's Section 214 application. Under the Ohio Bell NCC agreement, NCC must raise over $20 million to purchase the cable facilities. Metropolitan thus maintains that the Commission is obligated to determine NCC's ability to pay, for if NCC is unable to do so Ohio Bell would bear the financial burden for any construction costs. In turn, such costs could be passed on to Ohio Bell's monopoly ratepayers or, alternatively, to shareholders, Metropolitan concludes.

15. Also, Metropolitan states, now that NCC has elected to exercise its option, Ohio Bell's proposal both violates the MFJ and exceeds the Commission's jurisdiction under Section 214 of the Act. In an attempt to avoid running afoul of the telephone-cable television cross-ownership rules, Petitioner claims, Ohio Bell now treats its proposal as a contract for construction and sale of broadband transport facilities, which it claims violates the circumscription of the activities Bell operating companies are permitted to provide under the MFJ. Moreover, Metropolitan asserts, the DOJ letter[11] addressing C&P's proposal to construct cable facilities in the District of Columbia, which Ohio Bell relies upon, does not sanction the outright sale of cable facilities by a telephone company. While the DOJ ruled that C&P did not need a waiver of the MFJ, Metropolitan concludes that the DOJ

based its position on the finding that C&P would retain legal title to the facilities so that its proposal was not substantially different from a conventional channel service offering. Here, Ohio Bell simply would construct and sell the facilities, leaving it with no legal ownership interest whatsoever. Therefore, Metropolitan urges, Ohio Bell must obtain an MFJ waiver.

16. Metropolitan maintains that the Commission lacks jurisdiction over that portion of the facilities to be sold to NCC. Basing its conclusion on the Commission's decision in *C & P, supra*, rejecting arguments that it lacked jurisdiction, Metropolitan notes that in that case the Commission relied on C&P's intent to provide its facilities pursuant to tariff and that tariff indicated C & P would be responsible for furnishing signal transport, i.e., channel service. But the same cannot be said of Ohio Bell's proposal, Metropolitan points out.

17. Ohio Bell also has filed a petition for leave to file a rebuttal memorandum, alleging that Petitioner raises new issues in its reply and makes new allegations of facts which warrant response. First, Ohio Bell charges that Metropolitan now claims that they are competitors, which it says is not supported by the record since Ohio Bell does not propose to "directly or indirectly furnish cable television in" Petitioner's market area. Second, Ohio Bell asserts there is no legal basis for Metropolitan's determination that Applicant must demonstrate the financial viability of NCC. The case on which Metropolitan relies is, Ohio Bell states, inapplicable;[12] in it the Commission spoke of reviewing the financial qualifications of Satellite Business Systems (the Applicant) to be a common carrier, whereas NCC is neither, according to Ohio Bell. Third, Ohio Bell claims its proposal does not significantly differ from that of C&P, except that C&P retained bare legal title. Furthermore, it notes, the Commission approved the applications of Pacific Bell and Wisconsin Bell both of whose systems were not precluded from purchase by their cable subscribers. Last, Ohio Bell contends that the DOJ C&P opinion did not hinge on C&P retaining legal title, but instead turned on the fact that the transfer of *de facto* ownership of facilities lessened the possibility of anticompetitive conduct by C&P because the customer had exclusive control over use of the facilities.

III. DISCUSSION

18. Metropolitan's argument that the Commission lacks jurisdiction in this case is not correct. Section 214 of the Act requires that the Commission certify that the proposed construction, acquisition or operation of an interstate line of communication by a carrier will serve the public convenience and necessity. The Commission's jurisdiction over telephone common carriers constructing facilities for the provision of cable television service is well established. In *General Telephone of California*, 13 FCC 2d 448 (1968), *aff d* 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969), the Commission stated that telephone companies con- structing cable facilities as an integral link in a continuous transmission of broadcast signals between cable operators' facilities and the premises of cable television subscribers are engaged in the provision of an interstate communications service.[13] Sections 63.54 - 63.55 of the Commission's rules generally prohibit telephone common carriers from directly, or indirectly, constructing cable television facilities and providing video programming to subscribers within their telephone service areas. *See* 47 C.F.R. §§ 63.54 - 63.55. The rules do not, however, prohibit telephone companies from constructing facilities to provide channel distribution service for use by others in their telephone service areas. *See* 47 C.F.R. § 63.57.

19. Section 214 speaks of prior Commission certification of *any* interstate construction of lines of communications by telephone companies subject to the Act. Section 214 reads in pertinent part:

(a) *No carrier shall undertake the construction of a new line* or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, *unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction*, , or operation, or construction and operation, *of such additional* or extended *line* . . . . [Emphasis added]

As the Commission considered the applicability of Section 214 to the provision of channel service by common carriers in *General Telephone*, it observed that:

Since *Section 214 requires certification as a prequisite to the construction of* " *any line* " and defines a line as "any channel of communication established by the use of appropriate equipment" . . . it would appear under the plain language of the section that CATV channel service provided by the telephone companies is encompassed within its provisions.[14] [Emphasis added]

The literal language of the Act as well as judicial interpretations support the view that telephone companies require Section 214 authority prior to the construction of any interstate line of communication irrespective of subsequent or ultimate ownership.[15]

20. Metropolitan has not demonstrated that Ohio Bell's channel service proposal is violative of any Commission rule. Ohio Bell has demonstrated its compliance with Section 63.57 of the rules and shown that the proposal will serve the public convenience and necessity. According to the application, Cleveland's City Council commissioned an evaluation team to study, deliberate and negotiate a non-exclusive franchise for construction of broadband cable television facilities in the city. Based, in part, on NCC's proposed use of Ohio Bell's planned broadband facilities, the City Council enacted an ordinance providing for NCC's provision of cable television service. In that NCC has opted to purchase the coaxial portion of the system, the proposal now consists of two parts: the "hub/interconnect network" which Ohio Bell will offer under tariff as a channel service, and the broadband coaxial cable facilities. The proposal does not materially differ from what other carriers have been authorized to construct. *See, e. g., C & P, supra*. In *C & P* the Commission stated that it is neither necessary nor appropriate for it to reach a determination on the merits of the purported MFJ violation, and we follow that policy here.[16]

21. Metropolitan's recommendation that Ohio Bell be required to comply with the interim cost allocation procedures adopted in the *Third Computer Inquiry* so that cross subsidization does not occur is unjustified. The Commission historically has required telephone companies to maintain separate books of account for their broadband transport service. This mechanism is designed to assist the Commission in detecting cross-subsidization of

services.[17] Metropolitan has presented no persuasive reasons to require more burdensome accounting procedures than we have in the past. As the Commission has noted in similar cases, this accounting procedure will provide a basis for subsequent Commission action should it prove necessary.[18] Besides, the *Third Computer Inquiry* proposed accounting regulations for dominant carriers providing enhanced services unseparated from basic services, a different circumstance than the one before us. Moreover, Metropolitan will have an opportunity to address this matter when Ohio Bell files its tariff.

22. Further, it has not been demonstrated that there is a likelihood that Ohio Bell will restrain NCC's ability to compete in other markets, either through design, construction and maintenance of the proposed system or by charges for service. As Ohio Bell points out, it will have no rights to discontinue service to NCC based on the services NCC provides except pursuant to an order of an "appropriate governmental authority". Nor will it likely be able to impose unreasonable and/or unjust rates, for the applicable rates require Commission approval before implementation. Our tariff review process will provide an opportunity to review in greater detail Ohio Bell's pricing strategies, rates, cost support data, terms and conditions.[19] Appropriate action can be taken should the need arise, but at this time such action does not appear necessary.[20]

23. The viability of NCC (the customer) is not an issue requiring Commission scrutiny in determining whether Ohio Bell's proposal will serve the public convenience and necessity under Section 214. It is our responsibility only to determine that the public convenience and necessity will be served by applicant seeking authority to construct new facilities. Any private line service provided to customers who fail raise the risk that costs may not be recovered, but rate payers are liable only for plant used and useful in the provision of their services. It is the carrier's responsibility to not engage in wasteful or improvident expenditures.[21] While it is true that failure of NCC to perform its routine funding obligation could subject Ohio Bell to a potential risk of loss, there is no showing in the record that this risk is significant or that ratepayers – and not stockholders – will bear any ultimate shortfall. The condition imposed in this order is structured to provide Ohio Bell's ratepayers with some means to discern whether the concerns expressed by Metropolitan unfold.

IV. CONCLUSION

24. We have considered the arguments presented by Metropolitan and find that this Commission may and will rule upon Ohio Bell's application. No persuasive arguments have been raised to justify denial and we believe that the public convenience and necessity will be served by grant of the application. As noted in the application, grant will create an opportunity to bring new and additional services to Cleveland. As we have done in similar cases, we will require Ohio Bell to maintain separate books of account for its broadband channel service to assure that any cross-subsidization will be readily apparent.[22]

25. Accordingly, IT IS ORDERED, that the application of Ohio Bell Telephone Company for authorization under Section 214 of the Communications Act of 1934, as amended, to construct and maintain broadband transport facilities in Cleveland, Ohio, IS GRANTED.

26. IT IS FURTHER ORDERED, that grant of the application provided for herein IS SUBJECT TO the following CONDITION:

That books of account for the broadband channel facilities separate from books of account for the telephone facilities shall be maintained in a fashion to reveal whether the construction and operation of the broadband channel facilities are being subsidized by regulated services.

27. IT IS FURTHER ORDERED, that Metropolitan's Petition to Deny IS DENIED.

28. This Order is issued under Section 0.291 of the Commission's rules and is effective upon its release. Failure of Ohio Bell Telephone Company to decline the authorization as conditioned within thirty-one (31) days from the release date will be construed as formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] These facilities primarily are employed by educational organizations to provide transmission of visual and aural instructional, cultural, and other types of educational material. However, the Commission now permits these organizations to lease a certain amount of their idle time to other entities to provide video entertainment programming.

[2] Ohio Bell's application, Exhibit 7, sub-exhibit 2, Tariff F.C.C. No. 43, pp. 11 and 12, offers the following definitions:

(a) A Headend is the location of the antenna, satellite dish, network central control equipment and associated signal processing equipment used to receive broadcast TV, cablecast, and FM radio signals, for distribution via the Broadband Transport Facilities. Signals are made available at the output of the headend to be placed on either the Subscriber Network, the Institutional Network and the Hub/Interconnect Network.

(b) A hub is one of a number of distribution points, located in Ohio Bell central offices, where optical or other signals are received from the Headend and converted to RF signals and connected to the "Trunk Cable" system.

[3] *See* 47 C.F.R. § 63.54 (b), Note 1, which states that no common carrier may provide channels of communications or pole line and/or conduit space to any entity which is directly or indirectly affiliated with the common carrier. As used here the term "affiliate" bars any financial or business relationship between the carrier and its customer, except the carrier-user relationship. A financial relationship where one is the debtor or creditor of the other is noted in the rule as a situation where an affiliation exists.

[4] *See* Comark Cable Fund III, 100 F.C.C 2d 1244, 1255 (1985) *recon. denied*, 103 F.C.C 2d 600 (1985). In that case, the Commission found that the telephone and cable television companies were affiliates and had violated Section 63.54 of the rules

as a result of one person owning the telephone company and providing guaranteed repayment of loans made to his son's cable television company. *Id.* at 1253.

[5] Report and Order, FCC No. 86-252 (released June 16, 1986). In this order the Commission authorized carriers (American Telephone and Telegraph Company and the Bell Operating Companies) subject to the structural separation requirement of Computer II, Second Computer Inquiry, *Final Decision*, 77 F.C.C 2d 384 (*Final Decision*), *modified on reconsideration*, 84 F.C.C 2d 50 (1980) (*Reconsideration Order*), *further modified on reconsideration*, 88 F.C.C 2d 512 (1981) (*Further Reconsideration Order*), *aff' d sub nom.* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), *cert. denied*, 461 U.S. 938 (1983), *aff' d on second further reconsideration*, FCC 84-190 (released May 4, 1984), to engage in the unseparated provision of enhanced services provided that they submit to the Commission an interim cost allocation plan prior to the implementation of such services. This plan must properly allocate the joint and common costs resulting from the provision of unseparated enhanced and basic services and be one of the alternative plans discussed in Notice of Proposed Rulemaking, CC Docket No. 86-111, FCC No. 86-146 (released April 17, 1986).

[6] United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff' d sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[7] Metropolitan contends there is no barrier to prevent Ohio Bell from setting prices so as to render new services by NCC uneconomical.

[8] *See* Ohio Bell's opposition, Exhibit D (DOJ's letter dated February 5, 1985).

[9] Pacific Bell, Mimeo No. 5847, released July 22, 1986.

[10] See, e.g. Chesapeake and Potomac Telephone Company of Virginia, 98 F.C.C. 2d 238, 239 (1984), *citing* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). In that case the court essentially determined that an entity likely to be financially harmed by a Commission decision has standing in that Commission proceeding.

[11] *See* note 8 *supra*.

[12] Satellite Business System, 91 F.C.C. 2d 940 (1982).

[13] General Telephone, *supra*, at 458. *See also* CATV, 2 F.C.C. 2d 725, 794 (1966); Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965); Ward v. Northern Ohio Telephone Co., 300 F.2d 816 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962); Pacific Telatronics, Inc., 37 F.C.C. 1163 (1964).

[14] General Telephone, *supra*, at 456.

[15] Non-dominant common carriers have blanket Section 214 authority for all of their domestic operations and service offerings. *See* Fifth Report and Order, CC Docket No. 79-252, 98 F.C.C. 2d 1191 (1984); Report and Order, CC Docket No. 84-28, 49 Fed. Reg. 21333, May 21, 1984.

[16] *See* C&P, *supra* at para. 21. The DOJ did not participate in this proceeding. *Cf.*, Glacier State Telephone Co., File Nos. W-602-201 and W-P-C-5353, Mimeo No. 1598, released December 31, 1984, in which the DOJ opposed a request for Section 214 authority and waiver of the telephone/cable television cross-ownership rules on grounds of potential competitive harm.

[17] *See*, Pacific Bell, Mimeo No. 5847 (released July 22, 1986) paras. 21 and 22; The Chesapeake and Potomac Telephone Company, Mimeo No. 35518, released January 30, 1985, paras. 20, 27, *recon denied* ; and Wisconsin Bell, Inc., Mimeo No. 6335, released August 30, 1986 paras. 17, 21, application for review denied FCC 84-618, released December 13, 1984, recon. denied, FCC 85-348, released July 11, 1985.

[18] *See* affidavit of John D. Chandler at para. 5: Ohio Bell has established auditable accounting procedures ("Keep-Cost" accounts) which identify and separately gather and account for all fully-distributed costs (and all reasonably estimable costs) associated with the services being furnished by Ohio Bell to NCC and Ohio Bell's costs in preparing for and negotiating its contract with NCC, including all costs of researching and preparing its bid for the contract. [Ohio Bell Opposition Exhibit C, p. 2].

[19] Generally, the Section 214 proceeding examines costs only insofar as it is necessary to determine, on a *prima facie* basis, whether costs are so substantial relative to benefits that the public interest would not be served by construction of the project. *See* AT&T, W-P-C-5560, para. 7, FCC 86-87, released March 10, 1986.

[20] Metropolitan does not challenge Ohio Bell's representation that NCC's decision to purchase (para. 8, *supra)*, moots its allegations of a proscribed interest and deferred payments.

[21] Satellite Business Systems, 91 F.C.C.2d 940, 946-47 (1982).

[22] We need not rule on the question concerning whether Metropolitan is a proper party in interest in this proceeding. Nevertheless, we have considered the merits of its petition and find that it has offered no evidence warranting denial of Ohio Bell's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies
Tariff F.C.C. No. 2

Transmittal No. 35

ORDER

Adopted: November 21, 1986; Released: December 2, 1986

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff revisions, filed by Ameritech Operating Companies (Ameritech) on behalf of Michigan Bell Telephone Company (MBT) on October 31, 1986, became effective on November 16, 1987. By Transmittal No. 35, Ameritech reduced by 51 percent MBT's special access rates in effect from November 16, 1986 to December 31, 1986. Ameritech contends that the rate reductions are necessary to assure that MBT does not exceed the authorized rate of return.

2. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Ameritech's revisions to determine whether larger rate reductions are warranted. MCI proposed a one day suspension. MCI maintains that Ameritech has failed to explain discrepancies in MBT's Average Net Investment (ANI) data[1] and has failed to explain why it used a single growth rate of develop the proposed special access rate revisions.[2]

3. On November 19, 1986, Ameritech filed an opposition to MCI's petition. Ameritech maintains that Commission Orders directing carriers to modify the accounting treatment of the closed end of WATS access lines and Account 645 required it to move significant investment from the switched to the special access category. This, according to Ameritech, accounts for the increase in MBT's special access ANI in June 1986.[3] Ameritech argues further that a single growth rate for special access rate elements is appropriate to determine across-the-board rate adjustments.

4. The Common Carrier Bureau has reviewed the tariff revisions, MCI's petition, and Ameritech's opposition. We do not find that there is a sufficient liklihood that the special access rate reductions would be found unlawful to warrant suspension and investigation at this time. Moreover, we note that the investigation MCI suggests would involve only one and one-half months of special access rates. In light of the substantial reductions proposed in this transmittal, we believe that such an investigation is unwarranted.

5. IT IS THEREFORE ORDERED that the petition filed by MCI Telecommunications Corporation against Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 35 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI notes that MBT's ANI for special access increased 35 percent from May to June 1986. It further notes that, in the October 1986 annual access tariff filing, Ameritech projects a reduction in MBT's ANI for the 1987 test year. MCI Petition at 2-3.

[2] *Id.*

[3] Ameritech accounts for the discrepancy between 1986 data and 1987 projections for ANI by stating that the ANI projection for the 1986 test year contained in the October 3, 1986 access tariff filing is understated. Ameritech Reply at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-443

In the Matter of

Amendment of Section 73.202(b), RM-5366
Table of Allotments,
FM Broadcast Stations.
(Picayune, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 3, 1986 Released: December 1, 1986

By the Acting Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Howes Broadcasting Company ("petitioner"), requesting the substitution of FM Channel 291C2 for 292A at Picayune, Mississippi. Petitioner also requests the modification of its license for Station WRMH(FM), Channel 292A, Picayune, Mississippi, to specify operation on Channel 291C2.

2. We believe petitioner's proposal warrants consideration. The channel can be allocated in compliance with the minimum distance separation requirements provided there is a site restriction 30.7 kilometers west of the community. The site restriction will prevent a conflict with a pending request for Station WGUD-FM (Channel 292A), Pascagoula, Mississippi, to upgrade its facility, and with Station KHAA(FM), Channel 294, Port Sulpher, Louisiana. A site restriction 30.7 kilometers removed from the center of the city means that it may be difficult to provide a city-grade signal to the principal community. The petitioner should provide information that a site is available that will meet the minimum spacing requirements and at the same time provide a city-grade signal to Picayune. At present, the allotment of Channel 291C2 also conflicts with the current transmitter site for Station WAKH(FM), Channel 289, McComb, Mississippi. However, Station WAKH(FM) has an application pending (BPH 860205IH), to relocate its transmitter and increase its facilities to the full Class C standards. If the application is approved, Channel 291C2 can be allocated to Picayune in full compliance with the spacing requirements with the site restriction. Thus, we shall propose to modify the license of Station WRMH(FM), Channel 292A to specify operation on Channel 291C2. However, we shall delay this modification until the McComb's station is licensed at the new transmitter site thus removing the short spacing. Since the proposed channel is adjacent to the current one, the modification could take place in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the Picayune, Mississippi area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
Community	Present	Proposed
Picayune, Mississippi	292A	291C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before January 22, 1987, and reply comments on or before February 6, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Eugene T. Smith
715 "G" Street, N.W.
Washington, D.C. 20003
(Counsel for the petitioner)

6 . The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making* to Amend Sections 73.202(b). 73.504 and 73.606(b) of the *Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7 . For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-437

In the Matter of

Amendment of Section 73.202(b), RM-5392
Table of Allotments,
FM Broadcast Stations.
(Warsaw, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1986 Released: December 1, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Mid-Mo Broadcasting Co. ("petitioner"), seeking the allocation of FM Channel 256A to Warsaw, Missouri, as that community's second FM broad- cast service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel, if allocated.

2. We believe petitioner's proposal warrants consideration. Channel 256A can be allocated to Warsaw, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules.

3. In view of the fact that the proposed allocation could provide a second FM broadcast service to Warsaw, Missouri, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
Community	Present	Proposed
Warsaw, Missouri	249A	249A, 256A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5 . Interested parties may file comments on or before January 22, 1987 and reply comments on or before February 6, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Kenneth W. Rains Sr.
Operations Manager
Mid-Mo Broadcasting Co.
Route 4, Box 86
Eldon, Missouri 65026

6 . The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend* Sections 73.202(b), 73.504 and 73.606(b) of *the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7 . For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in

reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-127

In the Matter of

Amendment of Part 65, Interstate
Rate of Return Prescription:
Procedures and Methodologies
to Establish Reporting Requirements.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 13, 1986 ; Released: December 3, 1986

By the Commission:

INTRODUCTION

1. Earlier this year we issued a Notice of Proposed Rulemaking (*Notice*) in the above entitled proceeding.[1] The *Notice* served three purposes. First, we proposed adopting rules to establish reports required to implement our decision in CC Docket 84-800, Phase I,[2] to enforce maximum rate of return prescriptions. Second, we proposed establishing some interim quarterly reporting requirements for the local exchange carriers (LECs) to enable us to monitor carriers' actual performance on an access element-by-element basis. Such reports will assist us in the tariff review process and provide the carriers with an early warning system if rate adjustments become necessary. Finally, we proposed clarifying and setting time limits for rate-base and interperiod adjustments.

2. We proposed establishing a quarterly rate of return report (FCC Form 492) which would be required from all LECs filing individual access tariffs with the Commission. These reports would have to be filed within three months after the end of the reporting quarter and would be aggregated at the same levels as the tariffs. We also proposed an eight month cut-off date for interperiod adjustments and revisions so that the reports could be used in a timely manner.

3. The National Exchange Carrier Association (NECA) would provide a quarterly report similar to the one proposed for the LECs, for the results of the pooled tariffs that it administers. AT&T Communications (AT&T) would be required to submit quarterly filings of individual category (MTS, WATS and Private Line) earnings based upon the Interim Cost Allocation Manual's (ICAM) principles.

4. We also tentatively proposed that all carriers and NECA use a consistent set of rate base and expense inclusion or non-inclusion principles for revenue requirement (tariff) filing and rate of return enforcement purposes. In addition, inasmuch as several zero cost sources of funds will not be utilized in calculating authorized rates of return,[3] we concluded that it was necessary to adjust the rate base to account for those items. We proposed to use the interstate portion of Total Plant in Service in order to identify the interstate portion of these zero cost funds for purposes of this adjustment. We indicated there would be a separate proceeding established to address these issues and finalize a methodology. In the interim, we proposed that the relevant Docket 19129 (Phase II)[4] and CC Docket No. 79-63[5] principles should be followed for purposes of the 1987 annual access filing and the initial rate of return reports.

5. Finally, we solicited comments on the scope and frequency of the basic reporting requirements along with more detailed comments on selected areas of regulatory concern. For example, we solicited comment on whether we should include intrastate rates of return on the form and whether reporting frequency should be a function of size of the carrier. We also asked for comment on the time frame and methodology for handling out of period adjustments so that they would accurately reflect the carrier's earnings in each period.

6. A great deal of comment was submitted in response to the *Notice*, with 25 parties filing comments and 15 parties reply comments.[6] After reviewing the record in this proceeding, we are accepting a number of modifications recommended by the respondents. The structure of our rate of return monitoring and enforcement reporting system is described in detail below.

7. We believe that the reporting system adopted today will enable us to enforce maximum rates of return and be of considerable value in the tariff review process. At the same time, we have been careful to minimize the burdens on reporting carriers. Based upon an analysis of the comments received, we have identified a number of key issues which are discussed in the succeeding paragraphs.

DISCUSSION

A. Quarterly vs. Annual Reporting

8. One major issue was the frequency of the reports. The majority of comments on this topic were filed by LECs and trade associations that represent carriers. Most of the commentors argued that quarterly data is too unstable and imprecise to use for making mid-period adjustments to tariffs to correct for under- or over earning.[7] The carriers contend that rate of return data must be viewed over a number of quarters in conjunction with other factors before any judgement can be made as to whether a carrier's earnings may exceed the maximum allowable rate of return for an entire monitoring period. Accordingly, a number of respondents recommended that the monitoring reports be submitted only on an annual or even biennial basis.[8] The commentors assert that quarterly reports would be unnecessarily burdensome, costly to produce, and would be inconsistent with the enforcement period being monitored. The carriers also argued that the data furnished as part of the annual access filing provides the necessary information for the tariff review process.

9. Some commentors supported our proposed quarterly reporting requirement.[9] A few respondents agreed with our initial finding that quarterly data are needed not only for enforcement purposes, but would also enhance the tariff review process. Moreover, the reports should provide us and the carriers with an early warning system if rate adjustments are necessary to correct any significant targeting errors.[10]

10. Carriers are obliged under the Communications Act of 1934, as amended, to assure that their rates are just and reasonable.[11] As the Ad Hoc Telecommunications Users Committee observed, "the two-year evaluation period

with automatic refunds will only partially protect users against unlawful carrier rates. Without an interim monitoring mechanism carriers that grossly mistarget earnings could reap a windfall at the expense of ratepayers prior to the ordering of any refunds."[12] Quarterly reports will identify gross targeting errors well before the end of an enforcement period.

11. The alleged burden arising from quarterly rather than less frequent reporting has been overstated by many commentators. We note that much of the data proposed in the quarterly reports must be compiled for the carriers' annual tariff filings. We also note that the LECs' most recent annual access tariff filings were characterized by "the absence of cost support of high quality presented in a timely fashion."[13] With quarterly reports, actual data for the current period will have already been made available at the time of the annual access tariff filings, providing not only a starting point for verification of the filing data, but also a check on the accuracy of the previously filed projections. We agree with the view that "any slight additional burden imposed on the carriers by actually filing a quarterly report with the Commission is far outweighed by the benefit to the Commission and the ratepayers in improving the tariff review process."[14]

12. While we conclude that quarterly reports are necessary, we believe we can modify our initial proposal to minimize the burdens. Each quarterly report will contain two parts. The first part will include information on a cumulative basis for the entire monitoring period. The second part will present similar information for the most recent quarter. Although Bell Atlantic agreed that quarterly reports would be justified by regulatory needs, they recommended that we amend our proposal to delete the requirement to report earnings for the quarter in addition to cumulative earnings.[15] We believe that information for the most recent quarter, in addition to cumulative results, will not increase the carriers reporting burden. Indeed, specific current quarter information can be developed simply by subtracting the prior cumulative period from the latest reported period, while taking into account the out-of-period adjustments. We had originally proposed that the report for each quarter be updated as later, out-of-period adjustments were made. This would have required carriers to go through the exercise of assigning out-of-period adjustments to specific quarters, a task not normally required for annual tariff filing purposes. We now believe it is unnecessary to impose this burden on the carriers, even though we realize that the reports for each quarter will be somewhat less valuable than if they were later restated to reflect out of period adjustments. The cumulative quarterly reports should reflect all adjustments and revisions and will therefore represent the latest and best view of the entire period. There should be no need to restate reports for prior quarters because all necessary adjustments to prior quarters will be reflected in the most recent report.

13. In order for the cumulative quarterly reports to be of value, we will need the total amount of out-of-period adjustments being reflected in the cumulative report and explanations containing sufficient detail to explain how and from which quarter out-of-period adjustments are being incorporated into the current quarter. Similarly, for adjustments to the current quarter, we will need information on the amount that should have been reflected in a different period. The carriers need not, however, allocate the adjustments to any particular quarter, so long as the adjustments occurred within the same rate of return monitoring period. This will enable us to utilize the cumulative reports for trend analysis.

14. Ameritech recommended that we modify our proposal and require the carrier to itemize and describe in detail only significant adjustments–that is, adjustments that have an annualized impact of 10 basis points or more within a reporting category.[16] Southwestern Bell supports Ameritech's suggestion on significant adjustments, and further recommends that we establish a minimum dollar amount in addition to the 10 basis point threshold to insure that only material adjustments be detailed in the report.[17]

15. We believe that by establishing limits for the reporting of detailed out-of-period adjustments, we will further reduce the carriers' burden when filing cumulative quarterly reports. We will slightly modify the Ameritech proposal and establish an annualized, 10 basis points or more, detailed reporting threshold for out-of-period adjustments within the three enforcement categories. Southwestern Bell observed that by adopting the current NECA guidelines for detailing significant retroactive adjustments--$1,000,000 for common line revenues, $300,000 for switched traffic sensitive and special access–we would establish a minimum reporting threshold that would not increase administrative burdens on the reporting exchange carriers.[18] We will also adopt Southwestern Bell's recommendation that we further refine this procedure to include a minimum dollar threshold.[19]

B. Level of Detail

16. In the *Notice*, we originally proposed to receive information from the reporting entities on Total Company, Total Company Subject to Separations, and Interstate Access (common line, switched traffic sensitive and special access). In addition, we proposed to receive information on the Limited Pay Phone category and to subdivide the Switched Traffic Sensitive category into end office, information and local transport (with end office including line termination, local switching and intercept).

17. There is widespread agreement among the commenting parties[20] that disaggregation should be limited to the enforcement categories (carrier common line, switched traffic sensitive and special access) established in the *Phase I Reconsideration Order*.[21] Some respondents go even further and recommend that we eliminate the carrier common line category as well because it is a mandatory NECA pool. The commentors argue that NECA should be the only entity to file rate of return information for the carrier common line access category, because NECA is responsible for development of the nationwide rate.[22] Only AT&T and the Networks (ABC, CBS and NBC) suggested more detail be required than we originally proposed in FCC Form 492.[23] AT&T recommended a level of detail similar to the information it currently provides in its interstate monthly report, while the Networks recommended redefining the scope of our rate of return reporting requirements to include service-specific reports for at least the television and program audio services, if not for each individual Private Line and Special Access service. In its reply comments, AT&T endorses limiting reporting categories to the *Phase I* enforcement categories.[24] AT&T continues to believe that collecting Billing and Collection information for the initial enforcement period is consistent with its position. AT&T further believes that, for themselves, we should limit their report-

ing to only two categories, MTS/WATS and Private Line, because those two categories would be consistent with the *Phase I Order*.[25]

18. As indicated in the *Notice*, individual element's earnings within the switched traffic sensitive category in excess of the ceiling will not automatically trigger a refund (absent the category as a whole exceeding the ceiling). Nonetheless, excessive earnings on particular elements will evoke close scrutiny.[26] For this reason, we continue to believe that information on each of the three access categories (end office, information, and local transport) within the Switched Traffic Sensitive enforcement category should be reported. Based upon this principle, we will also require AT&T to provide separate data for MTS, WATS and Private Line.[27]

19. Detail greater than that proposed in FCC Form 492 goes beyond the needs of this monitoring and enforcement system. Billing and Collection information, for example, is unnecessary because it is not a reportable category, or even included within a category as established in *Phase I* for enforcement purposes during the initial period.[28] The Billing and Collection category has also been detariffed, effective January 1, 1987.[29]

20. A number of parties suggested that we eliminate the limited pay phone category, total company data (Part 31), and total company data subject to separations.[30] The parties contend that the data is either insignificant (limited pay phone category), burdensome to produce, or unnecessary for enforcing interstate access rates of return. Because we are modifying our initial proposal and will not be requiring updates to the reports showing specific quarters, we agree that reporting of total company data could easily be misleading. Corrections or revisions of prior reports will only be incorporated in the latest cumulative report, and therefore the initial view of company data will not be comparable to company data submitted for other purposes. For these reasons, and because we are not requiring any categories beyond broad and easily identifiable ones, we will also eliminate the separate reporting of depreciation expenses. We additionally agree that the limited pay phone category is presently unnecessary because no company has shown any revenues for that category.[31] Should revenues start to accrue to this category they should be documented in the Remarks section of the report. We believe that the level of detail we will be obtaining should be adequate for our rate of return monitoring purposes, as well as being helpful in our tariff review process.[32]

C. Time Frame for Out-of-Period Adjustments and Revisions

21. In our *Notice* e we tentatively established an eight month time frame for out-of-period adjustments to be completed.[33] We believed then, and still believe, that a cut-off date for interperiod adjustments and revisions is necessary for us to utilize the rate of return reports for enforcement purposes in a timely manner. In the *Notice* we acknowleged that exceptions to the time constraints may sometimes be necessary, and indicated we would grant waivers to the cut-off date if a company could demonstrate extraordinary circumstances that prevent reporting of accurate data within the required time frame.

22. All commentors addressing this issue agreed that a cut-off period for out-of-period adjustments was necessary for us to enforce maximum rate of return prescriptions. However, we received considerable comment that the cut-off period was too short, would invite many requests for waivers, and would cause some situations in which legitimate adjustments would go unrecognized and possibly cause some improper refunds.[34] Most respondents recommended a 24 month out-of-period adjustment timetable which would be consistent with the time-frame already established between NECA and the LECs.[35] A few respondents agreed with our tentaitve finding that 8 months beyond the enforcement period would usually be sufficient.[36]

23. NECA stated that the tentative August 31 cut-off for the year following the enforcement period is incompatible with the data reporting abilities of many small exchange carriers who only conduct annual separations studies. NECA also indicated that the August 31 date is 16 months in advance of the time-frame for final adjustments for pool settlements and possibly before some companies have reached the end of their last annual study period applicable to the enforecement period. This could occur if a company's study period is other than the calendar year.[37]

24. Although the United Telephone System believes our time-frame for out-of-period adjustments should parallel NECA's, they suggest the 24 month adjustment period should be optional. They assert instead that a company should be permitted to close it books prior to the end of a 24 month cycle, and thus only be liable for interest payments until the refund was made and not until the end of the 24 month period.[38]

25. Alternatively, United suggests that we "permit a company to refund a certain percentage of its refund obligation, perhaps 85 percent, eight months after the monitoring period ended. The company could then continue to make out-of-period adjustments for the entire 24 month period and pay interest during this period only on the remaining (less the 85 percent) balance."[39] Both of United's alternatives provide a certain amount of flexibility that the strict eight month tentative time-frame suggested in the *Notice* lacked.

26. In order to best accommodate the concerns of the industry and still have the biennial enforcement report useful for refund purposes in the subsequent enforcement period, we will extend the final adjustment period one month. This will allow some additional time for the carriers, and the reports could still be used for effecting refunds at the annual October access tariff filings. To a large extent, we are consistent with NECA because we will allow adjustments of at least 24 months for the early portion of the enforcement period. Based upon the two-year (8 quarter) monitoring cycle, this will allow 24 month adjustment periods for the first three quarters of the enforcement period, with four of the remaining five periods including at least twelve months for out-of-period adjustments prior to the final cut-off. Because the bulk of the adjustments are normally identified in the first few months after the quarter ends, we believe this process is a satisfactory compromise and will capture virtually all of the adjustments.[40]

D. Docket 19129 Rate Base and Expense Allowances and Disallowances

27. In the *Notice*, we tentatively proposed that all carriers and NECA use the set of rate base and expense inclusion or non-inclusion principles established in Docket No. 19129 (Phase II),[41] for revenue requirement (tariff) filing and rate of return enforcement purposes.[42]

Virtually, all respondents addressing this issue argued against the use of these principles.[43] The carriers contend that this issue is complex and should be deferred pending the outcome of a separate proceeding. The commentors argue that the *19129* principles were established for the pre-divestiture "Bell System" years ago under a totally different environment. Additionally, they state that many of those principles are obsolete, but still require significant resources to identify and maintain the records necessary to effectuate the allowances and disallowances established in *19129*.[44] Pursuant to our request, Pacific provided a table showing the dollar effects of these principles based upon their July 2, 1985, access tariff filing.[45] Pacific claims the calculations demonstrate that the overall effect of these adjustments is small in relation to their overall revenue requirement. For example, the net effect of these adjustments on the interstate revenue requirements for Pacific Bell was a decrease of about $15 million or 0.8% of their total interstate revenue requirement of $1.9 billion. Pacific also contends that the time and resources expended to track and estimate this data is not only significant, but entirely disproportionate to its value. The effect on Nevada Bell's revenue requirements as contained in their July 2, 1985 filing was a decrease of only $400 thousand or 0.5% of their interstate revenue requirement. The non-Bell carriers indicated that to conform now, would create unnecessary and burdensome reporting requirements especially for smaller companies. Some respondents suggested that if we want consistency in reporting, that we drop the *19129* adjustment process entirely.

28. We see merit to the suggestion that we fully address and settle this issue in a separate proceeding, which is what we proposed in the *Notice*.[46] For the interim, we will not adopt our proposal to apply Docket 19129 principles to all reporting entities. We continue to believe in the basic tenets of Docket 19129 - that ratepayers should only be required to fund "used and useful" activities of the carriers. However, it would be both burdensome and confusing to implement new procedures for the non-Bell carriers during the interim while the matter is under review in our separate proceeding. Therefore, we will not change the status quo (having these principles continue to apply only to the former Bell system companies) at this time. We expect the separate proceeding to be completed prior to the October 1987 tariff filing. For that filing we will require the newly established rate base and expense inclusion and exclusion principles to be universally applicable, so that the final year of the monitoring period will be based upon the newly established principles for all companies.

E. Zero Cost Sources of Funds

29. In CC Docket No. 84-800, Phase II, we specified that beginning January 1, 1987, zero cost sources of financing be excluded from cost of capital calculations.[47] We proposed that, since zero cost sources of funds will no longer be considered in establishing a carrier's authorized rate of return, that we effectuate those "zero-cost" offsets by proportionately reducing the interstate rate base.[48] We further proposed to use the interstate portion of total plant in service to identify the interstate portion of these zero cost funds for purposes of this adjustment.[49] This issue was also addressed in the last rate of return proceeding for the former integrated Bell System that was conducted before the divestiture.[50] In the *Notice, we stated that further refinements and modifications to those identified in CC Docket No. 79-63 would be addressed in a separate proceeding.*

30. Many commentors felt it would be improper to deduct zero cost sources of funds from the LECs' present rate base, and some proposed delaying the implementation of our proposals until this too was settled in a separate proceeding.[51] Some carriers indicated that, given the removal of zero cost sources of funds from the cost of capital calculation on and after January 1, 1987, we can at that time begin to exclude these funds from the reported net investment information.[52] However, they explained that during the initial earnings review period of October 1, 1985, through December 31, 1986, the 12.75% rate of return prescription applies. Zero cost sources of financing were treated differently in that prescription as compared to the 84-800 methodology. In calculating the 12.75% weighted average rate of return, we included the above referenced sources of financing in the capital structure at zero cost.[53] Many respondents contend that if we had not included those items in the cost of capital calculation, the weighted average rate of return would have been higher than 12.75%.

31. Since the 12.75% rate of return applicable to the initial monitoring period already reflects zero cost sources of funds, the net investment or rate base figures reported for that period should include those funds. Otherwise, there would be a mismatch between the calculation of the prescribed rate of return for the initial monitoring period and the reported returns for that period. For that reason, we will drop this adjustment for the initial monitoring period reports.

32. Many respondents felt we should defer the zero cost sources of funds issue to a separate proceeding. We disagree that deferral would serve the public interest. While we may ultimately modify some of our specific guidelines, we have concluded that for the access year beginning January 1, 1987, all carriers should make the zero-cost adjustments proposed iNotice. To delay implementation of zero-cost treatment pending further refinement would have the result of ignoring completely zero cost sources of funds, because those items were specifically omitted from consideration in prescribing the authorized rates of return for 1987-1988.

F. Intrastate Data

33. In the *Notice*, we solicited comments on whether intrastate rates of return should be incorporated into our proposed form, including the details on methods used by individual states for computing a rate of return. All parties commenting on this issue argued strenuously that we should not require it.[54] The basic arguments were: intrastate rates of return are not relevant to the tracking of a LEC's rate of return in the interstate jurisdiction; they are burdensome to produce; and they would lead to confusion based upon the differing sets of principles allowed by the various state regulatory agencies. NYNEX says that comparing inconsistent returns to each other, or to interstate returns, will simply not be meaningful.[55] We agree that this data is unnecessary for us to monitor and enforce interstate rate of return prescriptions.

G. Certification Statement

34. In the proposed FCC Form 492 we included the following certification statement:

I certify that I am the chief financial officer of _____; that I have examined the foregoing report; and that this is, in all respects, a true, correct, and complete report.

Date

_____
(Signature)

_____
(Title)

35. Commentors on this issue advocated a less stringent certification.[56] Some argued that financial certification by the chief financial officer is not a reasonable or necessary request. Others contended that the attestation should only be presumptively correct, and should be handled in the same manner as other Commission filings. Basically, they argue that no report or ruling should be conclusively binding, as there must always be room for correction in recognition of the volatile nature of the access market.

36. In recognition of the validity of the commenting parties claims, we will modify our proposal and adopt the certification statement from the annual report FCC Form M with minor modification. This will establish an attestation consistent with other financial reports required by this Commission.

H. Special Allowances for Small Carriers

37. In the *Notice*, we proposed to make the rate of return reporting requirements applicable to all LECs filing individual access tariffs, and to require that the reports be aggregated at the same levels as the tariffs.[57] However, we did solicit comments on whether or not reporting frequency and detail should be a function of carrier size.

38. For the most part, commentors on this issue were small companies or groups that represent them.[58] All the responses favored some type of relief for the small carriers. Some respondents suggested that we exempt small carriers from the proposed reporting requirements and implement the streamlined regulation proposed in the USTA Petition.[59] Others suggested that we require less detail, and annual or biennial reporting only. Some even suggested that we accept existing carrier records instead of the proposed report. The carriers argue that we have little need for rate of return reports from small carriers, and the economic inefficiencies and costs that these reporting requirements would generate would be substantial.[60]

39. Fidelity Telephone Company (9,011 access lines), which closes its books and makes one cost study per year, estimates that the cost of the quarterly reporting requirement would be far in excess of $50,000 per year, equating to at least $5.50 per end user per year. The Bourbeuse Telephone Company (1,428 access lines) estimates the cost of quarterly reporting to be at least $1.50 per end user per month. Another way the Boubeuse Telephone Company expresses the magnitude of their estimated $25,000 implementation cost is by comparing it to last year's interstate revenue requirement of $115,000. They argue that the $25,000 (22%) increase in revenue requirements would be borne by the interexchange carriers in the form of increased access charges, which they feel would drive "bypass" as well as the de-averaging of toll rates.

40. We certainly do not intend or wish to create unnecessary reporting requirements or impose unnecessary costs on any carrier. We believe that the modifications to our proposed reporting requirements adopted today are beneficial to all carriers, and will be particularly favorable to the small independent telephone companies. The only report requiring updating will be the biennial enforcement report. Also, by requiring detailed information only for significantly large dollar value adjustments, there should be very little, if any, detailed specification regarding out-of-period adjustments necessary from small carriers when the cumulative reports are filed. In addition, by delaying the implementation of any new rate base adjustments, we are particularly easing the implementation of this rate of return reporting system on small carriers. We see no merit to readdressing the applicability of the Regulatory Flexibility Act since it has been adequately addressed elsewhere.[61]

41. We realize that many of the small exchange carriers do not conduct quarterly cost studies and therefore do not have up to date data on some of their separated costs. As we indicated in the *Notice* (n.7) for AT&T, we would expect all carriers to use the most current factors available in their quarterly reports. If data are not available or are being estimated, we expect that to be explained in the Remarks section. Although some of the factors may be stale , at least it should provide a good approximation for comparing the initial results with those reported as part of the tariff review process. The final enforcement report, however, should reflect the current, final factors.[62]

42. As a final note, NTCA asserted that our *Notice* did not address the filing of a common access tariff by several small carriers.[63] We did address this concern indirectly when we stated that the reports would have to be filed at the same level of aggregation as the access tariffs. Because this is essentially the same process that NECA uses for filing its pooled tariffs and associated rate of return reports, we see no reason not to follow the same procedure for any joint filing. As NTCA observes, this will avoid imposing extra burdens on carriers seeking to file interstate tariffs. This policy also grants treatment to the small carriers similar to the treatment that would be accorded to the BOCs should the regional holding companies file aggregated tariffs for some or all of their operating companies.[64]

I. Miscellaneous Issues

43. A few commentors suggested that we clarify the reporting procedure for handling refunds through revenue requirement reductions as defined in our *Notice*, para. 14.[65] By treating the effected refunds as "additional operating revenues" for reporting purposes we can see whether an access category being adjusted through a refund is earning above its adjusted maximum rate of return in the monitoring period. This should provide a clear picture of current earnings for the reporting period.

To further clarify this issue we will specifically indicate on Form 492 that the "add-backs" are net after taxes and include details in the instructions on the development of the adjusted return.

44. We initially proposed that the computation of average net investment (ANI) should be based upon beginning and end-of-period amounts divided by two.[66] A number of carriers claimed that it would be more accurate to compute ANI by taking the sum of ANIs for all months in a reporting period, and dividing by the number of months in the reporting period.[67] We agree that this method is more desirable, but realize that monthly ANIs may not be available for all reporting entities. However, we will modify the general instructions to incorporate the suggested modification, and require those carriers not conforming to this method to indicate their computational methodology in the Remarks section.

45. Ameritech proposed that we modify the FCC Form 492 general instructions to require "earned" (i.e., separations-based, adjusted) revenues rather than unadjusted "booked" revenues.[68] Ameritech provided three reasons.

> First, earned revenues reflect adjustments so that the revenues reflected on the report relate to the appropriate period. Second, using earned revenues would be consistent with how expenses and other items are to be reported on FCC Form 492. Third, earned revenues are consistent with how revenues are reported for jurisdictional separations purposes and, thus, the data base underlying the level of access tariff rates.

We find merit to Ameritech's proposal calling for "earned" rather than "booked" revenues, and will modify the instructions accordingly.

46. Ameritech also proposed that the computation of Federal income taxes for access categories be computed on the basis of net revenues as opposed to investment.[69] Section 69.402 of the Commission's Rules provides, *inter alia*, that local exchange carriers (LECs), in developing access charges, shall apportion state income taxes (S.I.T.) and federal income taxes (F.I.T.) among access elements in proportion to investment (access methodology).[70] The Separations Manual[71] and the Commission's tariff review plan,[72] however, provide that S.I.T. and F.I.T. shall be apportioned among access elements in proportion to, essentially, income before taxes (separations methodology). The historical cost of service studies that are submitted with annual access tariff revisions are to be filed for the upcoming year using the separations methodology.[73]

47. We find merit to the claim that, on a historical basis, allocating taxes on net revenues more closely aligns costs with the services causing those costs. For rate of return enforcement reporting, we shall adopt the separations methodology because it will yield rates of return consistent with those filed in the tariff review process. A number of carriers have recently petitioned this Commission to change the Part 69 rules regarding allocation of taxes for prospective, tariff computation purposes. Our decision to allocate taxes based on revenues with respect to the reporting of historical earnings does not foreclose a contrary result when addressing prospective tariff filings. We will evaluate those proposals to modify Part 69 in a separate proceeding.[74] .pa

OTHER MATTERS

48. The rule changes in Parts 1 and 65 necessary to implement Form 492 are attached as Appendix B. Information to be requested in the quarterly rate of return report is included in Appendix C.

49. Pursuant to the Regulatory Flexibility Act of 1980, (Act) 5 U.S.C. §605(b), it is certified that the rules adopted in this proceeding are exempt from application of that statute because they will not have a significant economic impact on a substantial number of small entities. These forms will only be filed by the local exchange carriers that have filed access tariffs with this Commission.[75] This certification shall be provided by the Secretary to the Chief Counsel for Advocacy of the Small Business Administration as required by Section 605 of the Act.

50. The Office of Management and Budget has approved the collection of information requirement contained in this rule. The OMB control number for this collection of information requirement is 3060-0355.

CONCLUSIONS

51. We conclude that the filing of FCC Form 492 will be minimally burdensome, and that it is necessary to implement our decision in CC Docket 84-800, Phase I, to enforce maximum rate of return prescriptions. The cumulative and quarterly reporting for an enforcement period will enable us to monitor carriers' actual performance at the level necessary to assist us in the tariff review process. This reporting system will provide an early warning system if rate adjustments become necessary. Further, the proposed form has been modified in accordance with the discussion herein to accommodate the commenting carriers' concerns.

52. Quarterly reports are necessary for us to monitor interstate rates of return on a more current time frame than annual reports. We see no reason to require quarterly reports for the initial monitoring period (October 1, 1985 through December 31, 1986) since analagous and more detailed data will be provided in the carriers' annual access filing which will be filed at approximately the same time as the proposed effective filing date for rate of return reporting. Therefore, to further ease the implementation of this reporting system, we will only require a biennial enforcement report for the initial monitoring period. This will be required by March 31, 1987, with the finalized report due by September 30, 1987. Cumulative quarterly reporting will start with the first quarter of 1987 and shall be filed by June 30, 1987.

53. The American Telephone and Telegraph Company (AT&T) and the National Exchange Carrier Association (NECA), which are additional reporting entities, should adhere to the previously discussed formats and time schedule in filing their required reports for the initial review period. Additional specification of reporting requirements for those two entities shall be prescribed by the Chief, Common Carrier Bureau on delegated authority, bearing in mind our goal of imposing the minimum burdens necessary.

54. Accordingly, IT IS HEREBY ORDERED, That Parts 1 and 65 of the Commission's Rules are amended as set forth in Appendix B, effective March 9, 1987.

55. IT IS FURTHER ORDERED, that the adjustments for zero-cost sources of funds, discussed in paragraph 32, shall be included in the tariff filings for the 1987 access year.

56. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX A

Initial Commenting Parties

1. ABC, CBS and NBC (Networks)
2. ALLTEL Corporation (ALLTEL)
3. American Telephone & Telegraph Company (AT&T)
4. Ameritech Operating Companies (Ameritech)
5. Anchorage Telephone Utility/Municipality of Anchorage (Anchorage)
6. Bell Atlantic Telephone Companies (Bell Atlantic)
7. BellSouth Corporation (BellSouth)
8. Bourbeuse Telephone Company (Bourbeuse)
9. Central Telephone Company (Centel)
10. Cincinnati Bell Telephone (Cincinnati)
11. Contel Corporation (Contel)
11. Elkhart Telephone Company, Fort Bend Telephone Company, Granite State Telephone, Merrimack County Telephone Company, Taconic Telephone Corporation and Telephone Electronics Corporation (Elkhardt, et al.)
12. Fidelity Telephone Company (Fidelity)
13. GTE Telephone Companies (GTE)
14. Huntel Systems (Huntel)
15. Mountain States Telephone & Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West)
16. National Exchange Carrier Association, Inc. (NECA)
17. National Telephone Cooperative Association (NTCA)
18. NYNEX Telephone Companies (NYNEX)
19. Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
20. Pacific Bell and Nevada Bell (Pacific)
21. Southern New England Telephone Company (SNET)
22. Southwestern Bell Telephone Company (Southwestern)
23. United States Telephone Association (USTA)
24. United Telephone Systems, Inc. (United)

Reply Commenting Parties

1. Ad Hoc Telecommunications Users Committee
2. American Telephone & Telegraph Company
3. Ameritech Operating Companies
4. Bell Atlantic Telephone Companies
5. BellSouth Corporation
6. Contel Corporation
7. Elkhart Telephone Company, Fort Bend Telephone Company, Granite State Telephone, Merrimack County Telephone Company, Taconic Telephone Corp., and Telephone Electronics Corp.
8. GTE Telephone Companies
9. Mountain States Telephone & Telegraph Co., Northwestern Bell Telephone Co., and Pacific Northwest Bell Telephone Co.
10. NYNEX Telephone Companies
11. Organization for the Protection and Advancement of Small Telephone Companies
12. Pacific Bell and Nevada Bell
13. Southwestern Bell Telephone Co.
14. United States Telephone Assoc.
15. United Telephone System, Inc.

APPENDIX B

Parts 1 and 65 of the Code of Federal Regulations is amended as follows:

1. Authority citation for Part 1 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.795 is added to read as follows:

§ 1.795 Reports regarding interstate rates of return.

Carriers shall file reports regarding interstate rates of return on FCC Form 492 as required by Part 65 of this chapter.

3. Authority citation for Part 65 continues to read:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat., 1066, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

4. A new Subpart is added to read as follows:

Subpart E: Rate of Return Reports

§65.600 Rate of Return Reports.

(a) Subpart E shall apply to those interstate communications common carriers and exchange carriers that are so designated by Commission order.

(b) Each exchange carrier or group of carriers which has filed individual access tariffs during the preceding enforcement period shall file with the Commission, with-

in three (3) months after the end of each calendar quarter, a quarterly rate of return monitoring report. Each report shall contain two parts. The first part shall contain rate of return information on a cumulative basis from the start of the enforcement period through the end of the quarter being reported. The second part shall contain similar information for the most recent quarter. The final quarterly monitoring report for the entire enforcement period shall be considered the enforcement period report. Reports shall be filed on the appropriate report form prescribed by the Commission (See § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and information requested in the currently effective report form. The number of copies to be filed shall be specified in the applicable report form. At least one copy of the report shall be signed on the signature page by the responsible officer. A copy of each report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection. Final adjustments to the enforcement period report shall be made by September 30 of the year following the enforcement period to ensure that any refunds can be properly reflected in an annual access filing.

(c) Each designated interstate carrier shall file with the Commission, within three (3) months after the end of each calendar quarter, a quarterly fully distributed cost report based upon the Commission's Interim Cost Allocation Manual principles.

Appendix C

FCC Form 492-A
Rate of Return Report
Company Name
[Dollar amounts shown in thousands]
Cumulative for Rate of Return Measurement Period from _____ to _____

Item	Interstate Access* (A)	Common Line (B)	Switched Traffic Sensitive			Special Access (F)
			End Office (C)	Information (D)	Local Transport (E)	
1. Total Revenues						
2. Total Expenses and Taxes						
3. Oper. Inc.[Net Return] [1-2]						
4. Rate Base Avg.Net Invest.						
5. Rate of Return Annualized [3/4]						
6. FCC ordered refund-amortization for current period [net after taxes]**						
7. Net Return including effect of FCC ordered refund [3+6]						
8. ROR including effect of FCC ordered refund annualized [7/4]						

* Interstate Access accounts shall be adjusted according to FCC Docket 19129 and other relevant Commission Orders, if applicable.

** See instruction 13.

FCC Form 492-B
Quarterly Rate of Return Report
Company Name
[Dollar amounts shown in thousands]
Current Quarter Ending _____

Item	Interstate Access* [A]	Common Line [B]	Switched Traffic Sensitive			Special Access [F]
			End Office [C]	Information [D]	Local Transport [E]	
1. Total Revenues						
2. Total Expenses and Taxes						
3. Oper. Inc.[Net Return] [1-2]						
4. Rate Base Avg.Net Invest.						
5. Rate of Return Annualized [3/4]						
6. FCC ordered refund-amortization for current period [net after taxes]**						
7. Net Return including effect of FCC ordered refund [3+6]						
8. ROR including effect of FCC ordered refund annualized [7/4]						

* Interstate Access accounts shall be adjusted according to FCC Docket 18128 and other relevant Commission Orders, if applicable.

** See instruction 18.

REMARKS

I certify that I am the chief financial officer or the duly assigned accounting officer of _____; that I have examined the foregoing report; that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true and this report is a correct statement of the business and affairs of the above-named respondent in respect to each and every matter set forth therein during the period from , to inclusive.

_____ _____

Date (Signature)

_____

(Title)

(Persons making willful false statements in this report form can be punished by fine or imprisonment under the provisions of the U.S. Code, Title 18, Section 1001)

GENERAL INSTRUCTIONS

1. This report is prescribed under authority of Sections 4(i),4(j); and 205 of the Communications Act of 1934, as amended. Form 492 shall be filed in duplicate with the Federal Communications Commission, Washington, D.C. 20554, not later than three (3) months after the end of the reporting quarter by all local exchange companies filing individual access tariffs with the Commission, and shall be aggregated at the same jurisdictional levels as the tariffs. An additional six (6) months, from the initial due date, will be allowed for carriers to correct their complete enforcement period report.

2. Form 492 is needed to provide this Commission with data required to fulfill its regulatory responsibilities with respect to interstate telephone service under Title II of the Communications Act of 1934, as amended. Information from the Form 492 is used, for example, to measure whether the rate of return earned by the carriers exceeds the limits imposed by this Commission, and selected data from the Form 492 are tabulated in the annual publication Statistics of Communications Common Carriers published by the Commission.

3. All instructions shall be followed and each question shall be answered fully and accurately. Sufficient answer shall appear to show that no item has been overlooked. The expression "none" or "not applicable" shall be given as the answer to a particular inquiry if it truly and completely states the fact. Any data that requires clarification should be footnoted and fully explained in the Remarks section. If the space provided is insufficient for the required data or it is otherwise necessary or desirable to insert additional statements or schedules, the insert pages should include the name of the respondent and the time period covered, in a style conforming as nearly as practicable to that appearing on the regular page.

4. All amounts of money shall be shown in thousands of dollars. Losses or other negative items shall be shown in parenthesis. Rates of return shall be shown to the nearest hundredth.

5. Revenues should include only revenues earned during the report period. Costs should also reflect only those costs incurred in the report period. The total amount of out-of-period adjustments reflected in the report shall be listed in the Remarks Section. Also, significant out-of-period adjustments shall be footnoted and explained. Significant out-of-period adjustments are those adjustments having an annualized 10 basis points or more impact within the three enforcement categories (common line, switched traffic sensitive and special access). In conjunction with the 10 basis point threshold, carriers need only report retroactive adjustments above the following amounts:

$1,000,000 for common line revenues

$300,000 for switched traffic sensitive revenues

$300,000 for special access revenues.

6. Interstate adjustments to rate base, expenses and revenues shall be based upon FCC Docket 19129 and other relevant Commission orders, if applicable to the reporting entity.

7. Total Revenues (earned during the report period) shall include service revenues, interest during construction, if applicable, and miscellaneous operating revenues less uncollectibles.

8. Total Expenses and Taxes shall include operating expenses, depreciation, amortization, other expenses, interstate allowances and disallowances if applicable, as well as all taxes.

9. Average Net Investment (Rate Base) shall include accounts 100.1, 100.2, 100.3, 100.4, 122, 171, 172, and 176. Computation shall be calculated by taking the sum of the average net investments for all months in a reporting period and dividing by the number of months in the reporting period. Deviations from this methodology should be footnoted and documented in the "Remarks" section.

10. Rates of return for the cumulative measurement period shall be annualized with the appropriate multiplicative factor and that factor shall be listed on the form. Rates of return on a quarterly basis shall be annualized with a multiplicative factor of 4.

11. "Switched Traffic Sensitive" consists of line termination, local switching, intercept, information and local transport. End office includes line termination, local switching and intercept. For reporting purposes, equal access implementation costs should be included within "end office." Rates of return for the switched traffic sensitive category should be calculated and listed on lines 5 and 8 between columns C and E.

12. Column A should equal the sum of columns B through F. Rates of Return in column A should equal the weighted average of the sums of columns B through F.

13. Use the following table to develop the after tax effect of an FCC ordered refund.

1. FCC Ordered Refund (Total) _____
2. Refund for period (amortized) _____
3. Tax Rate _____
4. Refund adjusted for taxes _____
(line 3 multiplied by line 2)
Enter here and on Form 492, line 6 _____

APPENDIX D

Sample Letter

FEDERAL COMMUNICATIONS COMMMISSION

Washington, D. C. 20554

July 25, 1986 In Reply Refer To

Mr. John Doe
Vice President, Tariffs
XYZ Telephone Co.
Oshkosh, WI 50439

Dear Mr. Doe:

This is written to call your attention to the fact that the Commission currently is confronting a serious problem regarding inaccurate historical cost and demand data that have been furnished by many local exchange carriers (LECs) in support of their annual access tariff filings. Although Section 61.38 of the Commission's Rules, 47 C.F.R. /S 61.38, requires that tariff filings that contain proposed rates be accompanied by historical support data, the data submitted by the LECs have been inaccurate in many instances. Often, LECs have made substantial revisions to the filed historical data by submitting errata long after the original filing. Such a practice seriously detracts from the ability of the Commission and interested parties to evaluate the reasonableness of proposed rates. As we stated in the *April 14 Designation Order* :

> A primary failing of the July 2 [1985] filings was the absence of cost support of high quality presented in a timely fashion. This infirmity substantially hindered and, in some cases, probably discouraged petitioners from making a contribution to our review efforts through their comments.[1]

While support data inaccuracies that characterized earlier filings may be explainable as due to "start-up" problems associated with the inception of the access charge plan, LECs should now have sufficient experience to provide complete and accurate support data on the initial date of their tariff filings. Accordingly, it is required henceforth that in any case in which a carrier or the National Exchange Carrier Association (NECA) finds it necessary to file errata to historical or test year support data subsequent to the filing of annual comprehensive access tariff revisions, the carrier or NECA must accompany the errata with a request for special permission to make such filing. If the carrier's or NECA's request to file errata is refused, the carrier or NECA will be required to refile proposed rates supported by the errata, regardless of whether these rates differ from the

[1] Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase I, Order Designating Issues for Investigation, Mimeo No. 3643, released Apr. 14, 1986 at para. 11.

rates as originally proposed. In addition, it is required henceforth that carriers and NECA certify the accuracy of historical and test year data submitted in support of proposed rates by including a signed statement with their filing indicating that the support data are true, accurate, and complete.

It should be noted that although, as has been explained above, the filing of errata is not an adequate substitute for submission of accurate and complete support data in the original filing, carriers and NECA are under a legal obligation to file substantive corrections to the original support data.

It is our objective that compliance with the requirements set forth in this letter will solve the problems regarding support data that we have encountered in recent tariff proceedings. Your cooperation will assist us in achieving this objective.

Sincerely,

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements (CC Docket No. 86-127), FCC No. 86-157, released April 16, 1986, 51 Fed. Reg. 15020 (April 22, 1986).

[2] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC No. 85-527, 50 Fed. Reg. 41350 (October 10, 1985) (*Phase I Order*); *on reconsideration*, FCC 86-114, released March 24, 1986, 51 Fed. Reg. 1103 (April 1, 1986).

[3] Report and Order, FCC 85-645, released December 20, 1985, para. 44 and note 88; Section 65.300(a) of FCC Rules.

[4] American Telephone and Telegraph Company and Associated Bell System Companies - Charges for Interstate Telephone Service, Transmittal Nos. 10989, 11027, 11657, Docket No. 19129, (Phase II) FCC 77-150, 64 FCC 2d 1 (1977).

[5] American Telephone and Telegraph Company, CC Docket No. 79-63, 86 FCC 2d 221 (1981).

[6] A list of the commenting parties and the abbreviations used to identify those parties is attached as Appendix A.

[7] *See e. g.*, Comments of: Alltel p.1, Anchorage Telephone p.3, Bell Atlantic p.3, BellSouth p.7, Central Telephone p.5, Joint Comments of Pacific Bell and Nevada Bell p.4, SNET p.2, Southwestern Bell p.4, US West p.2, USTA p.18, United Telephone p.2.

[8] *See e. g.*, Comments of Alltel p.1, Ameritech p.5, BellSouth p.5, Bourbeuse p.1, Contel p.5, GTE p.10, Joint Comments of Pacific Bell and Nevada Bell p.4, SNET p.2, US West p.3, USTA p.18.

[9] *See e. g.*, Reply Comments of: Ad Hoc Telecommunications Users Committee p.3, AT&T p.5, Comments of NYNEX p.2.

[10] *Notice*, at para.6.

[11] 47 U.S.C. §201(b).

[12] Reply comments of Ad Hoc Telecommunications Users Committe p. 4.

[13] *In the Matter of Annual 1985 Access Tariff Filings*, CC Docket No. 86-125, Phase I, Order Designating Issues for Investigation (released April 14, 1986), ("Designation Order"), para. 11. *See also*, recent letters of July 25, 1986, to the local exchange carriers from the Chief, Common Carrier Bureau. A copy of one such letter is shown in Appendix D. In the access tariff review process, this Commission has repeatedly requested that the LECs furnish actual quarterly earnings data to supplement their cost support. *See, e. g., In the Matter of Annual 1985 Access Tariff Filings*, CC Docket No. 86-125, Phase I, Order, Mimeo No. 4383 (released May 9, 1986), para. 1; and *Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, Phase II, Part I, Memorandum Opinion and Order (released January 17, 1986), Table RCR.

[14] Ad Hoc Telecommunications Users Committee comments at p.5.

[15] Bell Atlantic comments at pp. 1-2. In its reply comments, p.2, NYNEX endorsed that suggestion by stating, "if quarterly reports are to be required, such reporting should be on a cumulative basis."

[16] Ameritech comments at p.21.

[17] Southwestern Bell reply comments at p.6.

[18] Southwestern Bell reply comments at p.6.

[19] Similar out-of-period adjustment reporting thresholds for AT&T shall be set by the Common Carrier Bureau after consulting with AT&T. Authority is delegated to the Chief, Common Carrier Bureau to prescribe those figures and other related details for AT&T's quarterly reports.

[20] *See e. g.*, Comments of Ameritech p.18, Bell Atlantic p.4, BellSouth p.3, General Telephone Operating Companies p.7, Joint Comments of Pacific Bell and Nevada Bell p. 3, SNET p. 5, Southwestern Bell p.10, USTA, p.3, United p.5.

[21] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 86-114, released March 24, 1986 (*Phase I Reconsideration Order*).

[22] *See e. g.*, Comments of Contel p.2, Cincinnati Bell Telephone p.2.

[23] Comments of AT&T p. 2, Networks p.2.

[24] Reply Comments of AT&T p.2.

[25] *Phase I Order* at para. 12.

[26] *Notice* at para. 5, *Phase I Reconsideration* at para. 38.

[27] For AT&T, the level of detail for the quarterly reports as well as the reporting thresholds for out-of-period adjustments shall be specified by the Common Carrier Bureau.

[28] Reply comments of Southwestern Bell p.4.

[29] Detariffing of Billing and Collection Services, CC Docket No. 85-88, FCC 86-31, released January 29, 1986.

[30] *See e. g.*, Comments of Southwestern Bell p. 10, USTA p.7.

[31] USTA comments at p. 6.

[32] Of course, we reserve the right to request more detailed data from the carriers if necessary for tariff review or other purposes.

[33] *Notice* at para. 13.

[34] *See e. g.*, Comments of NECA p. 3, USTA p.20.

[35] *See e. g.*, Comments of Alltel p. 2, Ameritech p. 4, Bell Atlantic p. 4, BellSouth p. 8, Contel p. 6, NEYNEX p. 6, USTA p. 22.

[36] *See* Comments of Contel p. 7, reply comments of AT&T p. 8.

[37] NECA comments p.3.

[38] Comments of United Telephone System at p.3.

[39] Comments of United Telephone System at p.3. In its reply comments, US West, p.3, sees merit to this proposal although US West believes that a company is still at risk since there is no mechanism available to recover a possible overpayment.

[40] In addition, we are willing to address waiver requests along the lines of United's proposal, that is, a partial refund with interest accruing on the portion retained by the carrier.

[41] Docket No. 19129, paras. 108-247.

[42] *Notice* at para. 16.

[43] *See e. g.*, Comments of Ameritech p.14, Contel p.4, Cincinnati Bell p.3, US West Companies p.5, NECA p.2, Pacific p.7, USTA p.8, Reply comments of Elkhart Telephone Co., et al p.7, GTOCS p.8, OPASTCO p.7.

[44] *See e. g.*, Comments of Pacific Bell and Nevada Bell p.8.

[45] Pacific Bell estimated revenue requirement effects for allowances and disallowances, attachment to June 12, 1986, letter from Pacific Bell to the FCC, Industry Analysis Division.

[46] *Notice* at para. 16.

[47] Report and Order, FCC 85-645, released December 20, 1985, para. 44 and n. 88; Section 65.300(a) of FCC Rules.

[48] *Notice* at para. 6.

[49] *Notice* at para. 16.

[50] American Telephone and Telegraph Company, CC Docket No. 79-63, 86 FCC 2d 221 (1981).

[51] *See e. g.*, Comments of Ameritech p. 14, BellSouth p.11, Cincinnati Bell p.3, Pacific Bell and Nevada Bell p.8, SNET p.12, Southwestern Bell p.8, reply comments of Elkhart Telephone Co., et al, p. 8, OPASTCO p.7.

[52] *See e. g.*, Comments of Ameritech p.16, BellSouth p.12, NYNEX p.4.

[53] AT&T, Petition for Modification fo Prescribed Rate of Return, CC Docket No. 79-63, released May 7, 1981, 86 FCC 2d 221, 249 (para. 79).

[54] *See e. g.*, comments of Anchorage Telephone Utilities p. 7, BellSouth p.11, Contel p.3, Cincinnati Bell p.3, General Telephone Operating Companies p.20, NYNEX p.6, Southwestern Bell p.12, USTA p.14, United p.8.

[55] Comments of NYNEX p. 6.

[56] *See e. g.*, Comments of Ameritech p.20, Cincinnati Bell p.3, Contel p.7, General Telephone Operating Companies p.19, joint comments of Pacific Bell and Nevada Bell p.10, SNET p.12, Southwestern Bell Telephone Company p. 6, USTA p. 23.

[57] *Notice* at para. 11.

[58] *See e. g.*, Comments of Alltel p.2, Anchorage Telephone Utility p.2, Elkhart Telephone Co. et al. p.3, Fidelity Telephone Company p.1, NTCA p.2, OPASTCO p.2, USTA p.19, Bourbeuse Telephone Co. p.1, Huntel Systems p.1, reply comments of AT&T p.4.n***.

[59] *See*, Public Notice, Mimeo No. 2881, released February 27, 1986, on USTA Petition Requesting Rulemaking Regarding Regulation of Small Telephone Companies.

[60] In addition, others disputed our finding that the Regulatory Flexibility Act, 5 U.S.C. §§601-612, does not apply in this proceeding.

[61] E.g. MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983) at paras. 358-362.

[62] In addition, after we receive a number of quarterly reports, we will require the Common Carrier Bureau to review the value of the small company reports to determine if we can accept less frequent or less detailed submissions.

[63] Comments of NTCA at p.4.

[64] See generally, Phase I Reconsideration Order at n. 62.

[65] See e.g., Comments of NTCA p. 4 SNET p. 10.

[66] Notice, Form 492 General Instructions, No. 9.

[67] See e.g., Comments of NYNEX p. 7, United Telephone System p.4.

[68] Comments of Ameritech p.20. In its reply comments, US West agreed with Ameritech's suggestion, p.3.

[69] See Comments of Ameritech p. 21.

[70] 47 C.F.R. §§ 69.402(a), 69.402(c).

[71] The Separations Manual, which is used to apportion costs between state and interstate jurisdictions, is incorporated into Part 67 of the Commission's Rules. 47 C.F.R. §§ 67.1 et s eq. The apportionment of state and federal income taxes is addressed in Section 412 of the Manual. 47 C.F.R. § 69.412.

[72] FCC Public Notice, Mimeo No. 2133, released Jan. 25, 1985; Erratum, Mimeo No. 2273, released Jan. 30, 1985.

[73] See, Commission Requirements For Cost Support Material To Be Filed With Access Tariffs On October 3, 1986, Mimeo No. 6356, released August 15, 1986.

[74] See, Public Notice on Petition for Rulemaking, RM 5527, released August 15, 1986. Similar Petitions for waiver were recently denied in Waiver of Sections 69.402(a) and 69.402(c) of the Commission's Rules, Memorandum Opinion and Order, Mimeo No. 6436, released August 19, 1986.

[75] This Commission has found all local exchange carriers to be dominant carriers in the Competitive Carrier proceeding, 85 FCC 1, 23-24 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 2, 1986

STATES WHICH HAVE CERTIFIED THAT THEY REGULATE POLE ATTACHMENTS

Pursuant to Section 1.1414(b) of the Commission's Rules on cable television pole attachments, the following States* have certified that they regulate rates, terms and conditions for pole attachments, and, in so regulating, have the authority to consider and do consider the interests of subscribers of cable television services, as well as the interests of the consumers of the utility services. Moreover, these States have certified that they have issued and made effective rules and regulations implementing their regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state).

(Certification by a State preempts the FCC from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.)

California	Michigan
Connecticut	New Jersey
District of Columbia	New York
Idaho	Ohio
Illinois	Oregon
Louisiana **	Utah ***
Maine	Vermont
Maryland	Washington
Massachusetts	

* "State," by Section 1.1402(g) of the Rules, means any State, Territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

** The Louisiana Supreme Court reversed the Court of Appeal for the First Circuit and ruled that the Louisiana Public Service Commission does have pole attachment jurisdiction (No. 86-C-0375, Sept. 8, 1986). (*See* Certification by the Louisiana Public Service Commission Concerning Regulation of Cable Television Pole Attachments, DA 86-115, released Nov. 7, 1986.) Accordingly, Louisiana has been added to the above list.

*** The petition concerning the adequacy of the rules and regulations adopted in Utah was withdrawn (DA 86-12, released Oct. 6, 1986).
Therefore, Utah remains on the above list.

(This Public Notice supersedes the Public Notice of Apr. 29, 1986, Mimeo No. 4150).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-442

In the Matter of

Amendment of Section 73.202(b),	
Table of Allotments,	RM-4999
FM Broadcast Stations.	RM-5069
(Brenham, Round Rock, Austin,	RM-5199
Caldwell, Belton,	RM-5397
Killeen, Brownwood and	RM-5497
West Lake Hills, Texas)	RM-5498
	RM-5420

NOTICE OF PROPOSED RULE MAKING

Adopted: November 3, 1986 Released: December 3, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration seven separate petitions for rule making which are either mutually exclusive or in some manner related. Each petitioner stated an intention to apply for the channel at the community requested, if allotted.

2. The first petition was filed by Tom S. Whitehead, Inc., ("Whitehead") licensee of Station KWHI(FM), Channel 292A, Brenham, Texas, seeking the substitution of Class C2 Channel 291 for Channel 292A and modification of its license to specify operation on Channel 291C2, as that community's first wide area coverage FM station (RM-4999). The substitution of Channel 291C2 for Channel 292A requires a site restriction of 17.4 kilometers (10.8 miles) west of the community to avoid short spacing to Station KIOC-FM, Channel 291 at Orange, Texas. Whitehead expressed a willingness to relocate its current transmitter site.

3. The second petition was filed by James Duff McClish, Sr., ("McClish") requesting the allotment of Channel 290C2 to Round Rock, Texas as that community's first FM service (RM-5069). Channel 290C2 requires a site restriction of 17.9 kilometers (11.1 miles) west of the community in order to avoid short spacing with the Brenham proposal.

4. The third petition was filed by Richard Belliveau ("Belliveau") requesting the allotment of Channel 290C1 to Austin, Texas, as that community's sixth FM service. Subsequently, Belliveau requested the withdrawal of his petition. However, a separate petition was submitted by Grass Roots Radio ("Grass Roots") requesting the allotment of Channel 290C1 to Austin, which we have accepted as supporting comments herein. Therefore, we will proceed with the Austin proposal at the request of Grass Roots as RM-5199. Channel 290C1 can be allotted to Austin in compliance with the Commission's minimum distance separation requirements. The Austin allotment would preclude the use of the channel at either Brenham or Round Rock. However, with a site restriction of 44.9 kilometers (27.9 miles) west of the community, it is possible to accommodate both the Austin and Brenham proposals, but not the Round Rock proposal. A site restriction 44.9 km removed from the center of the city may prove difficult to provide a city-grade (70 dBu) signal to the principal community. Therefore, Grass Roots or other interested parties should provide information that a site is available that will meet the minimum spacing requirements and provide a city-grade signal to the community if it wishes to take this position.

5. The fourth petition was filed by Call FM Radio ("Call FM") seeking the allotment of Channel 290A to Caldwell, Texas, as that community's first FM service (RM-5397). Channel 290A can be allotted to Caldwell consistent with the Commission's minimum separation requirements with a site restriction of 11.7 kilometers (7.3 miles) northwest of the city in order to avoid a short spacing to Station KHCB-FM, Channel 289, Houston, Texas. However, a site restriction 11.7 km removed from the center of the city may prove difficult to provide city-grade (70 dBu) signal to the principal community. Therefore, Call FM or other interested parties must provide information that a site is available that will meet the minimum spacing requirements and provide a city-grade signal to this community. Channel 290A at Caldwell would preclude the channel's use at Brenham, Round Rock or Austin.

6. The fifth petition was filed by Heart of Texas Communications, Ltd. ("Heart"), licensee of Station KTQN-FM, Channel 292A, Belton, Texas, seeking the substitution of Channel 290C1 for Channel 292A and modification of its license to specify operation on the new channel, as that community's first wide area coverage FM station. In order to accomplish the substitution at Belton, the substitution of Channel 282A for Channel 288A[1] at Killeen[2] (RM-5497) is required. Substitution of Channel 290C1 for Channel 292A at Belton requires a site restriction of 32.9 kilometers (20.4 miles) south of the community to avoid short spacings to Station KSTV-FM, Channel 289C1 at Stephenville, Texas and Station KTKS(FM), Channel 291 at Denton, Texas. Heart expressed a willingness to relocate its current transmitter site. Channel 282A at either Killeen or Harker Heights, Texas meets the Commission's minimum spacing requirements if Station KISJ-FM, Channel 281, Brownwood, Texas is reclassified as a Class C1 facility.[3] Channel 290C1 at Belton would preclude its use at Brenham, Round Rock, Austin or Caldwell. We shall serve the applicants at Killeen and Harker Heights, as well as the licensee of Station KISJ-FM with copies of this *Notice*.

7. Lewellyn Communications, Inc., ("LCI") licensee of Station KISJ-FM, is currently operating as a Class C1 facility but protected as a full Class C station. In an affidavit, LCI, states that it intends to continue to operate as a Class C1 facility and await the automatic reclassification date of March 1, 1987. LCI supports a waiver of Section 73.207 of the Commission's Rules to permit the allotment of Channel 282A to either Killeen or Harker Heights. Therefore, we will propose to reclassify Channel 281 at Brownwood, Texas to a Class C1 station.

8. The sixth petition was filed by Round Rock Radio Group ("R R Radio") looking toward the allotment of Channel 290C1 to Round Rock, Texas, as that community's first FM service (RM-5498). Channel 290C1 requires a site restriction of 20.8 kilometers (12.9 miles) southwest of the community to avoid short spacings to

Channel 288A at Killeen, Texas and Station KTQN-FM, Channel 292A at Belton, Texas. In imposing a 20.8 km site restriction on Channel 290C1 at Round Rock it would preclude the channel's usage at Brenham, Round Rock (as a C2), Austin, Caldwell or Belton. However, it is possible to accommodate this request and the Brenham proposal with a site restriction of 47.0 kilometers (29.2 miles) west of Round Rock. Due to the substantial site restriction, R R Radio or other interested parties should demonstrate in comments that a site is available that will meet the minimum spacing requirements and provide a city-grade signal over Round Rock if it wishes to take this position.

9. The seventh petition was filed by Alvin O. Kriegel, Jr., ("Kriegel") requesting the allotment of Channel 290C1 to West Lake Hills, Texas, as that community's first FM service (RM-5420). Channel 290C1 can be allotted to West Lake Hills consistent with the Commission's minimum distance separation requirements. This proposal precludes the channel's usage at Brenham, Round Rock, Austin, Caldwell or Belton.

10. The Commission has carefully studied each of the above requests and in para. 16 *infra* we set forth seven options for comments. As previously stated, the allotment of Channel 291C2 as a substitute for Channel 292A at Brenham can co-exist with the allotment of Channel 290C2 at Round Rock, see *Option II*. Channel 290C1 at Round Rock, conflicts with Brenham, but with a site restriction of 47 km imposed it is possible to accommodate both Brenham and the Class C1 at Round Rock, see *Option IV*. The Brenham and Round Rock (C2 or C1) proposals are in conflict with the allotment of Channel 290C1 to Austin, see *Option I*. However, if a site restriction of 44.9 km is imposed on Channel 290C1 at Austin it is possible to accommodate both the Austin and Brenham proposals, precluding Round Rock (C2 or C1), see *Option III*. We consider the other proposals, the allotment of Channel 290A to Caldwell, *Option V*, the substitution of Channel 290C1 at Belton, *Option VII*, and the allotment of Channel 290C1 to West Lake Hills, *Option VI*, as mutually exclusive.

11. We have determined that no other channels are available to resolve the conflicts. Therefore, these proposals must be comparatively considered. We shall provide each proponent an opportunity to demonstrate in comments herein why its community should receive the allotment. In this regard, the parties should be guided by the allocation criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), indicating the priorities of first or second aural service, first local and other public interest matters. There are three communities vying for the allotment of a first FM service, Round Rock, Caldwell and West Lake Hills; Belton and Brenham are seeking an upgrade of their current local FM service; and Austin is requesting a sixth FM channel. As between communities with equal priorities, the one which is the more populous will be preferred. Generally, the Commission favors a first local service. Therefore, parties seeking to upgrade their facilities should provide showings specifying the provision of first and second aural service.

12. The population figures as listed in the 1980 U.S. Census for each community are: Brenham 10,966; Round Rock 12,740; Austin 345,890; Caldwell 2,953; Belton 10,660; and West Lake Hills 2,166. 13. In our initial analysis of the proposals, as set forth in the seven options in para. 16 *infra*, preference would be given to providing Round Rock, the more populous community lacking any local service with its first FM service (Channel 290C1) and the substitution of Channel 291C2 for Channel 292A at Brenham, *Option IV*. We find the next choice would be to provide a lower class channel to Round Rock (Channel 290C2) with a lesser site restriction and the upgrade at Brenham, *Option II*. However, because of the lower class channel at Round Rock we consider this option inferior to *Option IV*. Then we would favor Caldwell, Channel 290A, *Option V*, as opposed to West Lake Hills, *Option VI*, based on population, as both communities presently lack local service. However, in this regard we note the pendency of a separate proceeding proposing to allot Channel 297A to Caldwell (RM-5544). We would next favor a sixth FM service at Austin (Channel 290C1) with a site restriction and the upgrade at Brenham, *Option III*. A lesser option would be Austin (Channel 290C1) as a sixth FM service, *Option I*, without the site restriction. Finally we propose the substitution of Channel 290C1 for 292A at Belton, *Option VII*, with a substitution at Killeen, Texas. The aforementioned preferences would be based on the information before us at this time and in accordance with the criteria set forth in para. 11 *supra*.

14. We shall propose to modify the licenses of Station KWHI(FM) at Brenham, and Station KTQN-FM at Belton, as requested herein. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept competing expressions of interest nor require that the petitioners demonstrate the availability of an additional equivalent channel at Brenham or Belton.

15. Since the communities of Austin, Round Rock and West Lake Hills are located within 320 kilometers (199 miles) of the common U.S.-Mexico border, concurrence by the Mexican government will be required for those proposals.

16. In view of the aforementioned, the Commission believes it is appropriate to solicit comments on alternative proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed[1]
	Option I	
Austin, Texas	229, 238, 252A 264, 272A	229, 238, 252A, 264, 272A, 290C1
Belton, Texas	292A	292A
Brenham, Texas	292A	292A
Brownwood, Texas	257A, 268, 281	257A, 268, 281
Caldwell, Texas	—	—
Killeen, Texas	222A, 227, 288A	222A, 227, 288A
Round Rock, Texas	—	—
West Lake Hills,		

Texas	—	—
Option II		
Austin, Texas	229, 238, 252A 264, 272A	229, 238, 252A, 264, 272A
Belton, Texas	292A	292A
Brenham, Texas	292A	291C2
Brownwood, Texas	257A, 268, 281	257A, 268, 281
Caldwell, Texas	—	—
Killeen, Texas	222A, 227, 288A	222A, 227, 288A
Round Rock, Texas	—	290C2
West Lake Hills, Texas	—	—
Option III		
Austin, Texas	229, 238, 252A 264, 272A	229, 238, 252A, 264, 272A, 290C1 (site restriction 44.9 km west)
Belton, Texas	292A	292A
Brenham, Texas	292A	291C2
Brownwood, Texas	257A, 268, 281	257A, 268, 281
Caldwell, Texas	—	—
Killeen, Texas	222A, 227, 288A	222A, 227, 288A
Round Rock, Texas	—	—
West Lake Hills, Texas	—	—
Option IV		
Austin, Texas	229, 238, 252A 264, 272A	229, 238, 252A, 264, 272A
Belton, Texas	292A	292A
Brenham, Texas	292A	291C2
Brownwood, Texas	257A, 268, 281	257A, 268, 281
Caldwell, Texas	—	—
Killeen, Texas	222A, 227, 288A	222A, 227, 288A
Round Rock, Texas	—	290C1 (site restric -tion 47.0 km west)
West Lake Hills, Texas	—	—
Option V		
Austin, Texas	229, 238, 252A 264, 272A	229, 238, 252A, 264, 272A
Belton, Texas	292A	292A
Brenham, Texas	292A	292A
Brownwood, Texas	257A, 268, 281	257A, 268, 281
Caldwell, Texas	—	290A
Killeen, Texas	222A, 227, 288A	222A, 227, 288A
Round Rock, Texas	—	—
West Lake Hills, Texas	—	—
Option VI		
Austin, Texas	229, 238, 252A 264, 272A	229, 238, 252A, 264, 272A
Belton, Texas	292A	292A
Brenham, Texas	292A	292A
Brownwood, Texas	257A, 268, 281	257A, 268, 281
Caldwell, Texas	—	—
Killeen, Texas	222A, 227, 288A	222A, 227, 288A
Round Rock, Texas	—	—
West Lake Hills, Texas	—	290C1

	Option VII	
Austin, Texas	229, 238, 252A 264, 272A	229, 238, 252A, 264, 272A
Belton, Texas	292A	290C1
Brenham, Texas	292A	292A
Brownwood, Texas	257A, 268, 281	257A, 268, 281C1
Caldwell, Texas	—	—
Killeen, Texas	222A, 227, 288A	222A, 227, 282A
Round Rock, Texas	—	—
West Lake Hills, Texas	—	—

17. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to each of the applicants for Channel 288A at Killeen, Texas, and the licensee of Channel 281 at Brownwood, Texas as follows:

Chase Communications Co., 4628 Amesbury, Dallas 75206; Harker Heights Communications, P.O. Box 2421, Harker Heights, Texas 76541; and Lewellyn Communications, Inc., P. O. Box 100, Brownwood, Texas 76804.

18. IT IS FURTHER ORDERED, That the petition filed by Richard Belliveau IS DISMISSED.

19. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

20. Interested parties may file comments on or before January 22, 1987, and reply comments on or before February 6, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Tom S. Whitehead
President
Box 1280
Brenham, TX 77833
(Petitioner for Brenham, TX)

Don Werlinger
Werlinger Communication Co.
602 Stueve Lane
Lockhart, TX 78644
(Consultant to McClish)

Barbara M. Barron, Esquire
602 Brown Building
708 Colorado
Austin, TX 78701
(Counsel to Round Rock Group)

Roy F. Perkins, Jr., Esquire
1400 20th Street, N.W.
Washington, D. C. 20036
(Counsel to Call FM Radio)

Alvin O. Kriegel, Jr.
P. O. Box 3501
Beaumont, TX 77704
(Petitioner for West Lake Hills, TX)

James Duff McClish, Sr.
1205 Magnolia St.
Lockhart, TX 78644
(Petitioner for Round Rock, TX)

Round Rock Radio Group
MBank Tower, Suite 1960
221 W. Sixth Street
Austin, TX 78701
(Petitioner for Round Rock, TX)

Eric Fishman, Esquire
Sullivan & Worcester
1025 Connecticut Ave., N.W.
Suite 806
Washington, D. C. 20036
(Counsel for Grass Roots Radio)

Call FM Radio
c/o Mr. Gene Randel
P. O. Box 627
Caldwell, TX 77836
(Petitioner for Caldwell, TX)

Lawrence Bernstein, Esquire
Mahler & Frantz
1818 N Street, N.W.
Suite 200
Washington, D. C. 20036
(Counsel to Heart of TX Communications, Ltd.)

21. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to* Amend Sections 73.202(b), 73.504 and 73.606(b) of *the Commission's Rules*, 46 FR 11549, February 9, 1981.

22. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commis-

sion consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] Although the petitioner requested the substitution of Channel 255A for Channel 288A at Killeen, Texas, that channel would have been mutually exclusive with a petition to substitute Channel 256C1 for Channel 257A at Lampasas, Texas (MM Docket No. 86-194, 51 FR 19864, June 3, 1986). However, the Lampasas petitioner, in its reply comments therein, suggested Channel 282A as a substitute in lieu of Channel 255A at Killeen. The documentation has been made a part of this proceeding. We, therefore, will consider the substitution of Channel 282A for Channel 288A at Killeen herein.

[2] Pending are applications for use of Channel 288A at Killeen, Texas or Harker Heights, Texas filed by Chase Communications Co. (BPH810827AK) and Harker Heights Communications (BPH820415AK), respectively.

[3] Pending is a construction permit issued to Lewellyn Communications, Inc., which specifies an antenna height for a Class C1 facility (BPH-860129JC).

[4] It should be noted that there are separate proposals pending in other proceedings to substitute Channel 251C1 for Channel 252A at Austin, Texas (MM Docket No. 86-208, 51 FR 21777, June 16, 1986); to allot Channel 231A to Brenham, Texas (MM Docket No. 86-238, 51 FR 23085, June 25, 1986); and to allot Channel 297A to Caldwell, Texas (RM-5544).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MIDWEST	File Nos. 52906-CL-P-181-B-86
MOBILEPHONE OF	52407-CL-P-193-B-86
MICHIGAN, INC	52410-CL-P-207-B-86

For construction permits to establish cellular systems operating on frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve:
Muskegan, Michigan (MSA 181)
Benton Harbor, Michigan (MSA 193)
Jackson, Michigan (MSA 207)

ORDER ON RECONSIDERATION

Adopted November 25, 1986; Released December 2, 1986

By the Chief, Common Carrier Bureau:

1. Midwest Mobilephone of Michigan, Inc. ("Midwest") has filed a petition seeking reconsideration of the action of the Mobile Services Division ("MSD") returning the above-captioned applications as unacceptable for filing. After careful review of the petition, for the reasons stated below, we conclude that the action of the MSD was proper.

Background and Contentions

2. Midwest's above-captioned applications were filed on May 2, 1986. On May 22, 1986, Midwest filed an erratum to each application, attempting to correct each application's cover page to read "Frequency Block A" instead of "Frequency Block B".[1] The MSD, finding Midwest's applications to be defective because of incorrect frequency designation, concluded that the applications were unacceptable for filing and an erratum could not cure an otherwise defective application.[2] Consequently, the MSD dismissed the applications.[3]

3. Midwest's petition seeks reconsideration and acceptance of its applications. Midwest argues that the incorrect frequency block designation was a typographical error. According to Midwest, it discovered the error within two weeks of submission, and traveled to Gettysburg, PA, on May 16, 1986, to submit corrected cover sheets but was rebuffed. Subsequently, Midwest filed the errata in Washington but again was unsuccessful. Midwest contends that these two notifications to the Commission were made several months before the Commission designated the wireline applications for lottery and that administrative efficiency would have been better served by accepting Midwest's errata.[4]

4. Midwest argues that dismissal of its applications is unwarranted as none of the Commission's goals governing the acceptability of applications for filing will be hindered or frustrated by accepting the applications. Midwest argues that by looking beyond the cover page to verify that the frequency block designation was in fact in error, the staff had already undermined the abbreviated application review procedure. Accordingly, Midwest contends, no further delay would have been incurred by accepting the applications.

Discussion

5. Section 22.913(b)(2) of the rules, 47 C.F.R. Section 22.913(b)(2), requires that: The applicant's name and the market, market number and frequency block applied for must appear on the cover of the application. Midwest's applications admittedly failed to comply with the requirements of this section. In our *Further Order on Reconsideration*, 59 Rad. Reg. 2d (P&F) 407, 410 (1985), we stated that each application must contain a certification stating that the application is complete and contains all of the information required by Form 401 and our cellular application rules. We specified that "[t]he signed certification must appear on the first page of each application ... the cover of which must include the applicant's name, market name and market number for which it is applying. . . . Failure to comply with the foregoing will result in the application being returned as unacceptable for filing." These requirements were intended to speed processing and avoid the year-long delay previously encountered with pre-screening applications. *Further Order on Reconsideration*, *supra*, paras. 7-8. In our *First Report and Order*, 58 Rad. Reg. 2d (P&F) 677 (1985), para. 47, we emphasized that the necessity to hunt through each application for relevant information was a major factor in this delay. Accordingly, we established the requirement that all identification information must be on the cover of the application.

6. We cannot agree with Midwest that its applications should not have been dismissed. As discussed above, the large number of applications and the pressing need to bring cellular service to the public resulted in the adoption of the certification method of processing. In both the *First Order on Reconsideration*, *supra*, para. 49, and the *Further Order on Reconsideration*, *supra*, para. 7, we emphasized that applications failing to comply precisely with the filing requirements would be dismissed. Accordingly, Midwest, and all other applicants, had fair notice of the importance we place on these rules.

7. Midwest's argument that by looking beyond the cover page to determine unacceptability, the staff undermined its own requirements is unpersuasive. Midwest has failed to present us with a special set of circumstances to justify waiver. *See generally Wait Radio v. FCC*, 418 F.2d 1153 (1969), *reh' g denied*, 459 F.2d 1203 (1972). If we were to permit Midwest to remedy its error, fairness would require that we permit all applicants with comparable errors to rectify them. Delay associated with permitting such corrections would detrimentally affect the processing time of such applications and undermine the purpose of our expedited acceptance procedures. *See also Pac Tel Mobile Access*, FCC 86-496 (released Nov. 12, 1986). Midwest's erratum to each of the applications, which tried to correct the deficiencies must be considered a curative amendment and is therefore not permitted. *Further Order on Reconsideration* at footnote 17. As a result, we will deny Midwest's petition for reconsideration.

8. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Midwest Mobilephone of Michigan, Inc. IS DENIED.

9. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Frequency Block A represents the non-wireline block, and Frequency Block B represents the wireline block.

[2] For each application, Midwest filed a pleading titled "Erratum" in attempting to rectify its error. Each erratum, however, was actually in the nature of an amendment and under Section 22.918(b) of the Rules, amendments to initial cellular applications may not be filed until a tentative selectee has been placed on public notice and then only by the tentative selectee.

[3] *See* Letter to Joseph P. Benkert, counsel for Midwest, from Chief, Mobile Services Division (Aug. 28, 1986). The filing of these errata in fact alerted the staff to Midwest's mistake and resulted in the MSD sending its letter to Midwest rejecting its applications. Had these errata not been filed, Midwest's applications would have been included in the applicable lottery but would have been dismissed had they been chosen.

[4] Midwest contends that accepting its applications would not disrupt the lottery process and states that the lotteries for the non-wireline markets in Muskegan, Benton Harbor, and Jackson have not been held. The lotteries for both the wireline and non-wireline lotteries in the Muskegan and Benton Harbor markets were held on the very day Midwest filed its petition; the lottery for the Jackson market was held one month thereafter.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-204

In the Matter of

Implementation and Scope of the
International Settlements Policy for
Parallel International
Communications Routes

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1986 Released: December 2, 1986

By the Chief, Common Carrier Bureau:

1. On January 30, 1986, the Commission adopted an order on the implementation and scope of its uniform settlements policy (*USP Order*).[1] In particular, the *USP Order* established a new requirement that transit traffic operating agreements establish a 50-50 division of the accounting rate and an equal sharing of the transit fee. The *USP Order* also established a transition period of 180 days from the release of the *USP Order* to allow carriers to bring their arrangements for indirect traffic into conformity with this new requirement or to file waiver requests showing good cause for non-uniformity.

2. On March 10, 1986, Graphnet, Inc. filed a Motion for Stay of the filing requirements regarding transit traffic . In support of its motion for stay, Graphnet argued: (1) that the public interest favors a stay; (2) that the Commission is likely, upon reconsideration, to remove this requirement; (3) that Graphnet and other carriers would suffer irreparable harm in the absence of a stay; and (4) that a stay would not cause substantial injury to others. Moreover, the Commission received six petitions for reconsideration which, with their associated pleadings, raised the issues Graphnet raised in its motion.

3. On June 27, 1986, the Bureau released an order extending the filing deadline for transit waiver requests to October 30, 1986; on October 28, 1986, we released a similar order extending the filing deadline to December 30. In this order we extend the filing deadline for transit waiver requests until further notice. This action should provide the Commission with time in which to resolve the issues raised on reconsideration, does not prejudge the Commission's final determination on such issues, and removes any burden on the carriers during this interim period.

4. Accordingly, on delegated authority, IT IS ORDERED that the filing date for waiver requests for transit traffic regarding divisions of tolls, as provided in the *USP Order*, IS EXTENDED until further notice.[2]

5. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this Order to be printed in the Federal Register.

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes, CC Docket 85-204, FCC86-30, 51 Fed. Reg. 4736 (February 7, 1986).

[2] This order is promulgated under delegated authority pursuant to Sections 0.201(a) and 1.101 of the Commissions rules, 47 U.S.C. §§0.201(a) and 1.101.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-80

In the Matter of

Amendment of §73.606(b), RM-5303
Table of Assignments,
TV Broadcast Stations.
(Gary, Indiana)

MEMORANDUM OPINION AND ORDER

Adopted: November 20, 1986 Released: December 2, 1986

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it for consideration the petition for reconsideration filed September 19, 1986, by Grant Subsidiary of Chicago, Inc. "Grant"), licensee of Station WGBO-TV, Joliet, Illinois, of the Report and Order in this proceeding, 51 FR 30364, published August 26, 1986. The Report and Order approved the exchange of channels between the permittees of noncommercial educational television Station WCAE, Channel *50, Gary, Indiana, and commercial television Station WDAI, Channel 56, Gary, Indiana. Thereafter, on November 13, 1986, Grant requested that its petition for reconsideration be withdrawn.

2. Accordingly, and pursuant to the authority contained in §0.283 of the Commission's Rules, the aforementioned petition for reconsideration IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief, Policy and Rules Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-262

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-4922
FM Broadcast Stations.
(King City, California)

ORDER DISMISSING PETITION FOR RECONSIDERATION AND DENYING REQUEST FOR RETENTION OF CHANNEL

Adopted: November 7, 1986 Released: December 3, 1986

By the Acting Chief, Policy and Rules Divison:

1. The Commission has before it for consideration a Petition for Reconsideration filed by King City Communications Corporation ("KCC") directed against the *Report and Order*, 51 F.R. 15003, published April 22. 1986. This proceeding allotted Channel 230B1 in lieu of Channel 221A at Station KLFA, King-City California, modified the KFLA license to specify operation on the new channel, and allotted Class B Channel 271 for general application. Ralin Broadcasting Corporation ("Ralin"), licensee of Station KLFA filed an Opposition to Petition for Reconsideration.

2. On July 25, 1986, KCC requested dismissal of its Petition for Reconsideration. Accordingly, this petition will be dismissed.

3. In its Opposition, Ralin requested that Channel 221A be retained in King City and that it be permitted to assign its license for this channel. In this connection, Ralin asserts that retaining this channel would be consistent with the Commission's recent action in *WPOW. Inc.*, released June 4, 1986 (FCC 86-275), which permitted AM Station WHAZ, Troy, New York, to file an application to change frequency and an application to assign its license for the former frequency. The rationale for that action was that such applications were not mutually inconsistent.

4. After careful consideration of this matter, we are of the view that favorable action on the Ralin request would not be warranted First of all, the Ralin request is, in essence, an untimely petition for reconsideration of the action in the *Report and Order* which substituted Channel 230B1 in lieu of Channel 221A in King City. Any request to retain Channel 221A in King City or otherwise modify that *Report and Order* should have been filed within 30 days. See Section 1.106(f) of the Rules. It is also our view that the Commission action in WPOW, Inc. is not applicable to this proceeding.[1] In WPOW, Inc., the licensee applied for a new frequency subject to competing applications. The present proceeding involved a petition for rule making which enabled Ralin to upgrade the KLFA facilities and modify its license without being subject to competing applications. *Modification of FM and TV Station licenses*, 98 FCC 2d 916 (1984). Once the KLFA license was modified in a rule making proceeding, Ralin no longer has any rights or interest in Channel 221A.

5. In view of the above, IT IS ORDERED, That the Petition for Reconsideration filed by King City Communications Corporation IS DISMISSED and the request by Ralin Broadcasting Corporation to retain Channel 221A in King City, California, IS DENIED.

6. For further information contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The policy set forth in WPOW. Inc. would be applicable in a situation where a licensee files an application for an allotted channel and wishes to file an application to assign its presently licensed channel.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition of

UNITED STATES SATELLITE BROADCASTING COMPANY, INC. File No. DBS-DR-1

For Declaratory Ruling Regarding
Permissible Uses of the
Direct Broadcast Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1986 Released: December 3, 1986

By the Commission:

1. Before the Commission for consideration is a petition for declaratory ruling filed by United States Satellite Broadcasting Company, Inc. ("USSB"), permittee of a direct broadcast satellite system;[1] oppositions to and comments on that petition filed by National Exchange Satellite, Inc. ("NEXSAT"), Harris Corporation - Farinon Division, Direct Broadcast Satellite Corporation, GTE Spacenet Corporation ("GTE"),.Aerospace and Flight Test Radio Coordinating Council, CBS, Inc. ("CBS"), Association of Maximum Service Telecasters, Inc., Magnavox Government and Industrial Electronics Company, Western Union Telegraph Company, Satellite Business Systems, Association of American Railroads, Central Committee on Telecommunications of the American Petroleum Institute, Hughes Communications Galaxy, Inc., and Omninet Corporation; and reply comments by GTE, NEXSAT, and USSB.

Background

2. In 1982, the Commission set aside an allocation of spectrum (12.2 - 12.7 GHz) for the Direct Broadcast Satellite ("DBS") service, contemplated primarily as a vehicle for direct-to-home video programming. The Commission made this allocation, which required dislocation of existing terrestrial fixed service ("OFS") operators, on the basis of DBS's potential "to provide extremely valuable services to the American people." *Report and Order* in General Docket No. 80-603 (" *DBS Order* "), 90 FCC2d 676, 680 (1982). The benefits anticipated include improved service to remote areas, additional channels of service throughout the country, a greater variety of programming better suited to individual tastes, technically innovative services, and expanded non-entertainment services. *Id.* In making this reallocation decision, the Commission noted that the 12GHz band has been allocated for this purpose internationally, and is the only spectrum available to accommodate high-power satellite systems[2] in the foreseeable future. In its early Orders establishing the DBS service, the Commission indicated that uses of DBS facilities for purposes other than the transmission of direct-to-home video entertainment programming could be permissible on a "secondary" basis. *DBS Order, supra* ; *CBS, Inc., supra.*

3. USSB asks the Commission to "clarify" the earlier statements it has made regarding the permissible uses of facilities authorized to provide DBS service. Specifically, USSB seeks a Commission ruling that DBS licensees would be permitted to provide data, voice communications and other non-video services if necessary to support the development of their proposed DBS operations. USSB contends that the Commission recognized that such uses could be made of DBS when it established the service and considered the first applications, citing *DBS Order, supra* at 682 and *CBS, Inc., supra* at 68. It continues that the only impediment to formal recognition of alternative uses was the completion of the 1983 Region 2 Administrative Radio Conference, an impediment which no longer exists. It stresses that flexibility has been a hallmark of Commission oversight, and that as long as the basic tenet of DBS service is observed, *i. e.*, direct-to-home service, other uses which are not inconsistent with this long-term objective should be permitted. It proposes that the possibility of non-conforming use as a fallback position would reduce the risk to investors that DBS might develop more slowly or to a lesser degree than predicted, as well as increase the early revenues necessary to support the very high up-front costs of launching a DBS system. It believes that such use would also accelerate the introduction of DBS receiving equipment into the marketplace. USSB and other commenters which support its request insist that an affirmative pronouncement from the Commission is necessary in order to assure investors of the degree of risk involved in a DBS venture, and thereby secure the major financial commitments necessary to initiate DBS service. USSB asserts that there would be a demand for non-conforming services, due to a lower susceptibility to error in data transmission and greater interference protection in the DBS band than in the fixed satellite service ("FSS") bands.

4. In conjunction with its request, USSB embraces specific standards proposed here by CBS for determining when such service would be permitted. These standards would place the burden of proof to demonstrate the necessity for the non-conforming use on the DBS permittee or licensee and would limit any such use to one five-year license term, with an increasing burden for every repeated request by an operator. A description of the specific proposed services would be required, as well as a plan for removing the non-conforming use at the end of the specified period. USSB argues, however, that requiring Commission approval prior to the institution of a non-conforming service would defeat the purpose of providing expeditious relief. Rather, it contends, notification should suffice, as the Commission would retain the power to take any responsive action deemed appropriate. It asserts that these safeguards would prevent the *de facto* reallocation of the DBS orbit/spectrum designations to FSS use.

Objections/Discussion

5. Several FSS and "OFS" (operational fixed service, terrestrial microwave) operators oppose USSB's petition. They variously argue that the Commission should formally institute a comprehensive reallocation of all or part of the DBS band in light of USSB's "admission" or their own predictions of the failure of DBS, that adoption of

USSB's proposal would amount to a *de facto* reallocation of the DBS spectrum, that USSB's non-conforming uses would not generate the needed revenues or are not necessary to establish the viability (or nonviability) of DBS service, that the distinctions of FSS service should be observed in any modification of the DBS service, and that a rulemaking is necessary to institute USSB's proposal.

6. One of the objectors' primary themes is that USSB's petition is evidence of the unsoundness of DBS, which has failed the "acid test" of any new product or service; *i. e.*, acceptance in the marketplace. Some project that DBS can never succeed, so that the allocation should be eliminated. Others assert that DBS requirements are merely speculative while very real needs for increased spectrum exist for other services, so that the DBS allocation should be reduced while the marketplace demand determines the most desired use of the spectrum.

7. These arguments are raised by terrestrial operators who were displaced by the DBS allocation.[3] The same arguments by the same parties were rejected only recently in *County of Los Angeles*, 102 FCC2d 724 (1985). As the Commission stated then, it continues to support the development of DBS as an important potential addition to the availability, diversity and technical enhancement of video programming, and hereby reaffirms its allocation decision[No] significant changes or events have occurred subsequent to the *DBSOrder*, [90 FCC2d 676 (1982)] or the *DBS Reconsideration*, [94 FCC2d 741 (1983)] which would undermine earlier findings or conclusions Nowhere in its decisions to date has the Commission explicitly indicated that its allocation decision was based on an expectation as to what particular date would see the first DBS transmission The Commission was and is aware that time is required for DBS operations to develop. *Id.* at 736. There are still no significant changes or events since that Order which would undermine those findings or conclusions.[4] USSB's petition does not demonstrate an inability to make DBS a successful enterprise, but is an effort by one of the several parties involved in DBS to define more closely the limits of its permissible operation in implementing its service.[5]

8. Several parties insist that the Commission's earlier mention of non-conforming uses was in the limited context of "broadcast-related" services, such as stereo sound, teletext and dual-language programming, as well as non-entertainment services such as educational programs or medical data supplied strictly as a secondary use, only if sufficient demand exists, and only in response to specific requests. They continue that USSB has made no demonstration of demand for its suggested non-entertainment services, but has only pleaded a lack of demand for its DBS services. They further contend that the Commission specifically stated that it did not anticipate the provision of FSS services, citing *DBS Order*, *supra* at 705.

9. Opponents are only partially correct in their characterization of the Commission's statements regarding ancillary and non-conforming uses of the DBS spectrum. The Commission's most positive statement regarding authorization of "innovative" services was in the context of services related to the provision of DBS service: "Many of the experimental DBS applications we have received propose innovative services, such as high definition television (HDTV), stereophonic sound, teletext, and dual-language sound tracks The flexible regulatory and spectrum allocation provisions we propose would allow authorization of any of these services." *DBS Order*, *supra* at 682. However, the Commission did also anticipate the development of other potential non-entertainment uses, and stated its definite intention to permit them: "DBS has a wide variety of potential uses other than entertainment programming, including educational programming, transmission of medical data, and the like. While we have not proposed reserving channels for such purposes, we would certainly allow them and we would expect them to be provided if sufficient demand exists." *Id.* The two examples suggested were not intended as an exclusive list. Furthermore, the Commission did not express an intention to require a showing of demand before such services could be authorized; rather, it clearly stated that it would expect them to be provided in response to demand, indicating an expectation that the entrepreneurs developing DBS service would make such decisions. It later added that non-conforming uses would remain secondary until international negotiations concerning the band were concluded and until more specific requests were made by applicants.[6] This statement clearly showed the Commission's intention to be as open and flexible in permitting various uses of the DBS allocation as possible.

10. The Commission's discussion of FSS services was limited to its rejection of a specific allocation for such services, as beyond the scope of the rulemaking: "The issue of this usage by the fixed-satellite service is beyond the scope of this proceeding. Further, we do not believe a case has been made to implement a fixed-satellite service allocation within the [DBS] band at this time." *DBS Order*, *supra* at 705. This conclusion further presumed a high level of demand for DBS authorizations: "[Several sources of information] all lead us to predict a large demand for spectrum for DBS in the near term." *Id.* at 705-06. Also, the Commission's consideration was in the context of possible FSS technical operation, which would constitute an inefficient utilization of the DBS allocation while precluding DBS operations. These statements demonstrate that in contemplating possible uses of the DBS allocation, the Commission did not exclude delivery of FSS-type services within the constraints of DBS technical parameters under the present circumstances.

11. Another recurring objection to USSB's petition is that USSB is effectively seeking a *de facto* reallocation of the spectrum. In conjunction with this point, some parties insist that any non-conforming use will extend indefinitely, because DBS will never be economically viable. Another argues that the standards proposed for determining the propriety of a non-conforming use are so amorphous as to be no standards at all. In any event, most objectors contend, the proposed uses are indefensible because the DBS allocation was established at the expense of other existing operations, and was specifically justified by the public benefits to be derived from the increased and advanced television services that DBS was expected to provide.

12. These objections anticipate a general restructuring of the service, which is outside the bounds of USSB's request and the Commission's discretion in this non-rulemaking proceeding. Moreover, the Commission most emphatically does not intend to permit any subversion of the respective DBS and FSS allocations. As just stated, the Commission remains firmly committed to the establishment of DBS service, and the potential benefits to be derived from that service continue to justify the DBS spectrum allocation. The Commission does not rely solely on the good faith of the petitioner and its supporters in

this proceeding to ensure that the goal of DBS service is not compromised. Most importantly, the technical requirements of DBS service retain a fundamental distinction in the way FSS and DBS services are delivered. FSS systems, with relatively few receive points, operate with lower power transmissions and invest resources in high-gain receive equipment. DBS systems, on the other hand, with a large number of receive units, must incorporate lower-gain receive equipment to minimize consumers' receiving costs, and must provide correspondingly higher-powered transmissions. The resulting high cost of building DBS satellite capacity simply makes it an economically uncompetitive means to provide FSS-type services.[7] Consequently, given the DBS technical requirements, there is little likelihood that any party will build a DBS system for the primary purpose of providing FSS service. Accordingly, the clarification rendered here will permit the maximum allowable usage of the DBS allocation consonant with the DBS allocation decision, and non-conforming uses which do not detract from the goal of introducing DBS service, and which may help to advance it, will be permitted to an extent which can be expected to help develop a DBS operator's service. The technical requirements essential to the provision of direct-to-home satellite service, including the key ingredients of strong transmission signals directed to relatively small and inexpensive receive equipment will continue to be vigorously enforced.[8]

13. Additionally, to further prevent any semblance of *de facto* reallocation, the ancillary nature of any non-DBS services will be further ensured by temporal restrictions which will absolutely minimize the possibility of a party applying for DBS facilities with the primary purpose of providing FSS-type services. Any DBS operator which provides non-DBS service is fully expected to initiate DBS service during its first (five-year) license term. Thereafter, a DBS operator may continue providing non-DBS service during the remainder of the life of its first satellites (presuming its license is renewed) only on those transponders on which continues to provide DBS service, and that non-DBS use cannot exceed fifty percent of each 24-hour day on any such transponder. An assessment of the propriety of continuing to permit some degree of non-conforming use of DBS satellites during future generations can be made under the circumstances prevailing at that time.[9] These restrictions should leave ample opportunity for DBS operators to utilize FSS services on an ancillary basis, if necessary, to foster their development of DBS services. At the same time, they preserve a meaningful disparity in the costs of providing FSS service from DBS and FSS satellites and increase the opportunity for providing actual DBS service. Contemplation at this time of any greater usage of non-DBS services would raise grave doubts as to the ultimate prospects for a DBS operation and the practical viability of non-conforming uses to promote that operation.

14. As long as non-conforming uses are limited by these technical and temporal restrictions and the ultimate goal of the provision of direct-to-home video services is advanced, flexibility of use remains an important touchstone for fostering the provision of DBS services. Furthermore, these factors obviate the need for extensive regulation and oversight of service offerings to ensure that non-conforming uses remain ancillary and do not effect a *de facto* reallocation. Also, consistent with this rationale, detailed demonstrations of the nonviability of DBS service and the need for relief at the time non-conforming service is offered will not be necessary. DBS operators will be required to notify the Commission of the initiation of a non-conforming service, to describe the service offering, and to explain how that service will be phased out or reduced after a specified period of time to accommodate the introduction or expansion of DBS offerings. The Commission can assess the need for any further restrictions on the basis of this information accumulated on actual service or services offered.

15. To remain within the bounds of the justification for the dislocation of other services operating in the DBS band, non-conforming uses of DBS facilities will not be entitled to protection from OFS operations existing at the time of the initiation of the non-conforming service. In order to prevent DBS operators from causing the dislocation of terrestrial operations by the broadcast of a minimal DBS service, only those individual channels providing DBS service for a substantial portion of the day will be entitled to protection (after September 1988), and then only during the time of DBS operation.[10] This provision may have the additional salutary effect of further encouraging the initiation of DBS services. As a practical matter, DBS operations, whether a conforming or non-conforming use, have the capacity to interfere with OFS facilities operating in the DBS band only in the unusual circumstance of an OFS receiver coincidentally pointing at an operating satellite. If interference does occur to a pre-existing OFS operation, the DBS operator will be required to take the steps necessary to resolve the interference problem.

16. In light of these continuing technical restrictions and the time limitations imposed, as well as the Commission's stated resolve to enforce them, parties' concerns that DBS would become another FSS service should be alleviated. As explained above, the DBS allocation will not become a viable means for parties intending to provide FSS service to avoid FSS qualifications standards, due to the distinct competitive disadvantages for DBS operators providing FSS-type services. Also, the DBS application process does not need to be reopened to present an opportunity for additional entities to apply under the new regimen, as argued by some parties. The purposes of DBS service are not altered by this Order, and the nature of the service is not essentially changed. Rather, non-conforming uses are permitted only for the purpose of fostering the provision of DBS service.

17. Several parties question the utility of the non-conforming uses sought by USSB, given the high cost of DBS satellite systems to provide services that can be duplicated by less expensive FSS satellite systems. Some stress that the limited period of use would discourage investment in, installation of, and reliance on systems that would have to be discontinued after a relatively brief usage. One party submits documentation establishing the adequacy of the present satellite capacity to handle FSS business, and speculates that the increase in fiber optics technnology will reduce the demand from its present levels, thereby increasing the available FSS capacity. Others point out that there are idle FSS transponders and propose they could be used to test the viability of video satellite services.

18. The Commission is asked here only to make the judgment that such non-conforming uses as suggested by USSB are permissible. It does find that when restricted as prescribed here, they are permissible. The utility of the

permission outlined above is left to USSB and other DBS operators, and their investors, to evaluate. Any limitation on its utility, as well as the availability of ample FSS facilities, will be reflected in their individual business judgments. Finally, FSS facilities cannot accurately duplicate the technical capabilities (small receiving units of modest expense to consumers) and multiplicity of video channels expected from DBS, and therefore cannot provide a "test" of public acceptance of DBS service.

19. As a final matter, it is noteworthy that DBS uplink transmissions are assigned to the 17.3 - 17.8 GHz band. Prior to the DBS allocation, 17.3 -17.7 GHz was part of the allocation for radiolocation services. A review of the Government Master File indicates five assignments that have the capability of operating in this band. DBS service, with a small number of uplink stations, should be able to operate providing little or no interference to these facilities. However, the types of service proposed by USSB could involve a larger number of uplink stations (*e.g.*, for two-way multi-point communication), increasing the potential for interference. While three of the five government assignments are capable of operating from 15.7 - 17.7 GHz, and therefore may possibly be limited to operation outside the DBS uplink band, the other two are classified secret, and their impact cannot be readily calculated. While their accommodation is likely in view of their small number, DBS operators must be aware of this possible limitation on their operations, which would include the requirement that they operate on a strict noninterference basis.

20. In view of the foregoing, IT IS ORDERED, That the Petition for Declaratory Ruling filed by United States Satellite Broadcasting Company, Inc. IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] USSB is authorized to construct and launch two satellites to provide direct broadcast satellite service on channels 18, 20, 22, 24, 26, 28, 30, and 32 from orbital positions 110°W and 148°W. *CBS, Inc.*, 92 FCC2d 64 (1982); *RCA American Communications, Inc.*, Mimeo No. 7115, Mass Media Bur., released September 19, 1985.

[2] High power transmission is necessary in order to minimize the cost of receive equipment, a critical consideration to make the service available to consumers on a widespread basis.

[3] These users are required to vacate the DBS band (12.2 - 12.7 GHz) by September 1988 or assume a secondary user status at that time, including strict noninterference to DBS systems. *DBS Order*, *supra* at 702.

[4] One party erroneously asserts that all but one of the first group of DBS permittees have dropped out. In fact, three of those parties continue to hold construction permits, launch authority, and specific orbit/spectrum assignments. Also, several additional DBS permittees and applicants have taken the places of other original applicants.

[5] Similarly, there is no basis for finding that USSB's petition demonstrates a reversal of USSB's financial qualifications, as suggested by one party.

[6] *CBS, Inc.*, *supra* at 68: "While the Commission generally allows various non-conforming uses in appropriate situations, such uses must be clearly secondary to the primary authorization of these non-conforming uses until after the results of RARC-83 are known, and until applicants make specific requests for such authorization."

[7] For example, an FSS satellite with sixteen 54-MHz-wide channels (operating at 50 watts per channel) could provide a signal over the entire continental United States ("CONUS") that is usable for data and voice communications, and would cost approximately $100-$120 million to build and launch. Two DBS satellites with sixteen 24-MHz-wide channels each (operating at 100 watts per channel) could provide a full-CONUS signal (half-CONUS from each satellite) also usable for data and voice communications, and would cost approximately $340-$400 million to build and launch. The per-channel cost is thus at least three times as high for DBS service at this time. Furthermore, the FSS channels, with wider bandwidths, may be capable of providing more service on each channel, depending on their configuration. While this disparity in costs may vary somewhat from the example presented here, depending on particular satellites and their configurations, this example illustrates the general magnitude of the disparity. Furthermore, even if this disparity in costs is reduced in future generations of satellites, some disparity is certain to persist, and is likely to remain significant. While the premium cost for DBS operation does provide a stronger, "higher quality" signal, it is of little practical value to the users given current transmission and reception equipment. Even if new equipment were developed to increase the efficiency of an FSS utilization of DBS satellites, and thereby provide more service for the money, those development costs represent a countervailing economic disadvantage. This factor will be further magnified by usage limitations which are imposed by this Order.

[8] This determination has already been stressed in an Order requiring two DBS applicants to amend their technical proposals to accomplish this basic service requirement. *Satellite Syndicated Systems, Inc., et al.*, 99 FCC2d 1369, 1379-84 (1984). In that case, the Commission rejected two DBS applications that proposed service with each channel delivered at fifty watts to cover half of the continental United States for an effective isotropic radiated power at center of service area of only 50.6 dBW. The Commission does not expect to approve any proposals which do not meet or exceed the level of DBS service which will be provided from currently approved DBS facilities.

[9] If the DBS allocation is underutilized for "conforming" DBS service at the end of the first generation of DBS satellites, as predicted by some of the opponents, the need for reallocation of the allocation of the 12.2 to 12.7 GHz band will be considered. In so doing, the Commission would take into consideration the public interest in all services then competing for the allocation. Contrary to the suggestion of one opponent, the Commission will not be constrained in any such reallocation decision by any party's investment in facilities providing any service premised on the basis of its temporary nature.

[10] A DBS operator which provides a non-conforming service will be required to demonstrate to the Commission the substantiality of its DBS service in order to receive protection for its DBS transmissions. Primary elements of any such demonstration will be the number of hours and specific times of day devoted to DBS service on the channel(s) for which protection

is sought. For example, a schedule of DBS service from 6:00 p.m. to midnight every day could be proposed as a substantial amount of DBS service.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of

CHRISTIAN CHILDRENS NETWORK, INC. — BC DOCKET NO. 80-461
Corpus Christi, Texas — File No. BPCT-791026KI

For Construction Permit

Appearances

Leonard K. Buntrock, pro se, on behalf of Christian Childrens Network, Inc.; and *Larry A. Miller*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL DECISION

Adopted: November 26, 1986; Released: December 3, 1986

By the Review Board: MARINO (Chairman), JACOBS, and BLUMENTHAL.

Board Member JACOBS:

1. In *Coastal Bend Family Television, Inc.*, 94 FCC 2d 648, 54 RR 2d 367 (Rev. Bd.), *recon. denied*, 95 FCC 2d 551 (Rev. Bd. 1983), the Review Board held that Christian Childrens Network, Inc. (CCN) was financially unqualified to be a Commission licensee and denied its application. In so doing, we noted that, but for this conclusion, a remand hearing would have been necessary to explore serious allegations of financial misrepresentation against CCN. On appeal, the Commission accepted two April 7 and July 22, 1983 financial amendments that CCN had filed (and which the Board had rejected) but did not find CCN financially qualified. Instead, it remanded the case for hearing on the financial misrepresentation issue that the Board had identified and directed the Commission's Mass Media Bureau to assess CCN's "present financial showing" and make a recommendation to the presiding officer whether CCN may be found financially qualified by summary decision or whether evidentiary hearings would also be needed on that matter. *Christian Childrens Network, Inc.*, 101 FCC 2d 612, 615 (1985).

2. At a prehearing conference on September 17, 1985, Mr. Leonard K. Buntrock, CCN's president and chief operating officer, agreed to a one-month deadline for preparing "an up-to-date financial statement demonstrating ... [CCN's] financial ability or qualifications under its application." Tr. 744. CCN submitted a responsive financial amendment dated October 14, 1985, and supplemented it with further showings dated November 22, 1985, December 11, 1985, and March 31, 1986. The Bureau analyzed CCN's first and principal financial showing and found it woefully inadequate, and presiding Deputy Chief Administrative Law Judge James F. Tierney (ALJ) added a financial qualifications issue against CCN. Memorandum Opinion and Order, FCC 85M-4854, released December 10, 1985.

3. After a two-day evidentiary hearing, the ALJ duly issued a comprehensive Supplemental Initial Decision (S.I.D.), FCC 86D-41, released June 3, 1986, in which he resoundingly disqualified CCN under both the financial qualifications and the financial misrepresentation issues. The proceeding is now before the Board on exceptions by CCN and a reply brief by the Mass Media Bureau. Having reviewed the S.I.D. in light of the exceptions and briefs and our independent examination of the record, we hereby adopt the ALJ's findings of fact and conclusions of law *in toto* and summarily affirm the denial of CCN's application.

4. This is another "nothing case," where the lack of merit in the appeal is obvious, *see Warmac Communications, Inc.*, 103 FCC 2d 1218, 1220 n. 2 (Rev. Bd. 1985), *rev. dismissed*, FCC 86-443 (Comm'n 1986). However, we note the court's injunction in *Martin-Trigona v. Smith*, 712 F.2d 1421, 1424 (D.C. Cir. 1983), that the rambling and confused pleadings of litigious *pro se* parties are entitled to patient analysis and reasoned decision. *Cf. Silver Beehive Telephone Co.*, 34 FCC 2d 738, 24 RR 2d 238 (1972)(*pro se* applicants assume burden of becoming acquainted with and conforming to Commission's rules and policies). Still finding CCN to be financially unqualified and, this time, also guilty of a gross and intentional financial misrepresentation, we reach essentially the same conclusion that we did three and one-half years ago. *See Coastal Bend, supra*. In *Christian Childrens Network, Inc., supra* at 613 and 614 n. 6, the Commission went far out of its way, citing "extraordinary circumstances" and "the particular circumstances of this specific case," to give CCN an opportunity to shore up its sagging financial plan and exculpate itself from the charge that it intentionally misrepresented its ability to rely on the proceeds from the sale of 37 acres of prime real estate to finance its proposed station. But CCN failed miserably at the remand proceeding and must suffer the consequences.

5. CCN's 13 pages of exceptions urge three points: (1) that CCN should have been able to demonstrate its financial qualifications based on its 1983 amendments alone, without having to update its showing, but that, in any event, its post-1983 amendments demonstrate that CCN is presently financially qualified; (2) that CCN did not misrepresent its use of a proposed sale of the 37 acres of real estate to fund its construction and operation, because it had adequate legal rights to sell the property and/or did not actually propose to use the property as a funding source; and (3) that when the competing application of its former mutually exclusive opponent, Coastal Bend Family Television, Inc., was dismissed at its own request in *Coastal Bend, supra*, 95 FCC 2d at 552-53, the Commission was obliged to reinstate the ALJ's original grant of CCN's application (94 FCC 2d 661), even though the Board had disqualified CCN and denied its application in 94 FCC 2d 648. We emphatically disagree with CCN on all three counts.

6. First, as to CCN's financial qualifications, in *seven years* of trying (CCN filed its original application on October 26, 1979), CCN has never succeeded in satisfying the Commission's two basic financial criteria: (1) a complete, adequately explained, and realistic estimate of proposed construction and initial operation costs, *see Erwin*

O'Conner Broadcasting Co., 51 FCC 2d 1114, 33 RR 2d 217 (Rev. Bd.), *rev. denied*, FCC 75-834 (Comm'n 1975); and (2) an adequately documented, sufficiently large, and reasonably available financial plan to fund the proposed costs, *e.g. Communico Oceanic Corp.*, 61 FCC 2d 159, 38 RR 2d 821 (Rev. Bd. 1976). At the remand hearing, CCN was "given the opportunity" (Tr. 744), not obligated, to update its financial showing beyond its 1983 amendments; Buntrock assented to a one-month period to submit an updated financial exhibit (Tr. 749-50); and it would appear that CCN was benefitted by the updating opportunity, because its October 14, 1985 amendment petition recites (at 4) that "The information contained in the application is no longer accurate." Under these circumstances, CCN cannot expect the Commission to permit it to rely on an admittedly inaccurate and out-of-date financial showing to demonstrate its "present" financial qualifications. We believe that the ALJ, CCN, and the Bureau properly interpreted the Commission's remand order to focus on an updated showing (if CCN cared to submit one), see Tr. 742-44, 749-50, and, having proffered an updated showing, CCN will not be heard to argue (as it does) that only its 1983 financial plan is relevant, that it has been denied due process, and that it had insufficient time to prepare the showing. As to the substance of CCN's October 14, 1985 showing and subsequent amendments, we affirm the ALJ's findings and conclusions that even if all of the amendments were accepted, CCN would still not have met its burden of demonstrating its financial qualifications. S.I.D., paras. 23-27, 40-57. No more need be said. Seven years of financial bumbling is enough.

7. Second, CCN persists in maintaining that its application and an August 11, 1980 amendment did not affirmatively misrepresent that it would fund its financial proposal by selling 37 acres of land that it did not then own. The record evidence against CCN is overwhelming. See S.I.D., paras. 3-22, 28-39. An unpaid lease and an unexercised option to purchase do not provide sufficient legal rights for an applicant to claim that it "presently holds" property for financial qualifications purposes. This subterfuge and other statements and financial exhibits in CCN's filings were clearly meant to convey, and did convey, the misimpression that (1) CCN owned the property and (2) planned to sell it to fund construction and operation of CCN's station. CCN's continuing stout denials are either self-deluding, disingenuous or both. We affirm CCN's disqualification because of this significant financial misrepresentation. *See WHW Enteprises, Inc.* v. *FCC*, 753 F.2d 1132 (D.C. Cir. 1985).

8. Finally, CCN misconceives the procedural and substantive consequences of the dismissal of its opponent's application. Once exceptions are filed that challenge the basic qualifications of an applicant, the Commission is not at liberty to grant that application without first ruling on that challenge. *See, e.g., Puopolo Communications, Inc.*, 60 RR 2d 964 (Rev. Bd. 1986). In the instant case, CCN was disqualified from being a Commission licensee in response to exceptions filed. *Coastal Bend, supra*. Hence, by definition, CCN could not later emerge as a licensee, unless first exonerated, even if its opponent dropped out. CCN clearly has not been exonerated here, and, as we previously said, "it is truly better to have an empty house than a bad tenant." 95 FCC 2d at 553. Corpus Christi deserves a fresh set of television applicants. Hopefully, CCN will now see the light and fade out.

9. ACCORDINGLY, IT IS ORDERED, That the application of Christian Childrens Network, Inc. (File No. BPCT-791026KI) for a construction permit to establish a new television broadcast station at Corpus Christi, Texas, IS DENIED.

. IT IS nd FURTHER ORDERED, That the motion to strike filed by the Mass Media Bureau on July 2, 1986 IS GRANTED, and James L. Oyster's June 23, 1986

"Statement for the Record" and Christian Childrens Network, Inc.'s July 1, 1986 "Ancillary Pleading to its Formal Notice of Appeal" ARE STRICKEN.

FEDERAL COMMUNICATIONS COMMISSION

Jerold L. Jacobs
Member, Review Board

FOOTNOTES

* We will grant the Bureau's motion to strike a "Statement for the Record" submitted by James L. Oyster, "an attorney who regularly practices before the Federal Communications Commission, as an uninterested party." Oyster admits that he lacks standing, and his pleading contains unsupported scandalous matter, some of which he deleted himself after Bureau objections. See Section 1.52 of the Commission's Rules, 49 CFR 1.52 (disciplinary action possible for scandalous contents of pleadings). CCN's tagalong pleading and request for investigation of allegations will similarly be stricken. Neither document presents a *prima facie* case warranting further attention, and we will not dignify their vague hearsay accusations by setting them forth.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-107

In the Matter of

American Telepnone & Telegraph Company's accounting and cost allocation plan for international service other than message telephone service

DECISION AND ORDER

Adopted: September 29, 1986 Released: October 2, 1986*

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The American Telephone and Telegraph Company (AT&T) filed an accounting cost allocation plan for the provision of international services other than message telepnone service ("Plan") on February 12, 19B6 in response to conditions set forth in the *International Competitive Carrier Order*.[1] The Plan describes accounting and cost allocation procedures for separating the costs of AT&T's international message telephone service (IMTS) from the costs of providing international services other than message telephone service (non-IMTS).[2] In this order we examine comments on the Plan submitted by interested parties. We order that AT&T make certain modifications to the Plan and that AT&T submit specified data concerning implementation of the Plan. Subject to these requirements, we approve the Plan. However, as explained below, we reserve the right to revisit this accounting plan following completion of our pending proceedings in CC Docket 86-111.[3]

II. BACKGROUND

2. On November 15, 1985, the Commission adopted the *International Competitive Carrier Order* in which it concluded that, given the dynamic growth in the international telecommunications market, it can now increasingly rely on market forces and streamline the regulations for non-dominant carriers. The Commission found that the approach will allow carriers to operate more efficiently and will allow them to better respond to customers' needs.[4] International *Competitive Carrier Order*, the Commission further concluded that the international telecommunications market can properly be divided into IMTS and non-IMTS; that only AT&T and the primary service providers of IMTS for noncontiguous domestic points[5] are dominant for the provision of IMTS; and that no carrier is presently dominant in the non-IMTS market. The Commission also decided to subject the tariffs for international services of non-dominant carriers to streamlined rules[6] which had been established in the *Competitive Carrier* proceedings.[7] However, because of AT&T's unique position in the provision of international services, and in recognition of the potential difficulties raised by the provision of dominant and non-dominant services within the same corporation the Commission required AT&T to file cost allocation and accounting plans for its non-IMTS operations. The Commission ordered the Common Carrier Bureau to conduct an initial review of the plan prior to implementing streamlined regulation. If the Bureau determined that the plan responded to the concerns expressed in the *International Competitive Carrier Order*, it could allow streamlined regulation to become effective. Subsequently, a detailed review was to be conducted with an opportunity for interested parties to comment.[8]

4. On February 12, 1986, AT&T submitted its Plan. Preliminary analysis by the Bureau staff led us to conclude that the Plan met the essential criteria identified in the *International Competitive Carrier Order*. Accordingly, on April 1,1986, we granted initial approval of the Plan and allowed streamlined regulation of AT&T's non-IMTS activities to become effective.[9]

III. SUMMARY OF THE PLAN

5. The Plan describes the process AT&T intends to use to identify and assign the revenues, costs, and investments attributable to non-IMTS and the facilities used to provide it. Within that process, costs, investments, and revenues are categorized as follows:

a. *Dedicated expenses, investments and revenues* are expenses, investments and revenues that support or derive from only non-IMTS.

b. *Shared expenses* are those expenses that are incurred in support of both non-IMTS and other services and thus are not dedicated.[10] Shared expenses are assigneo to the services by either an attribution process (attributable expenses) or by general allocation (generally allocable expenses).

c. *Attributable expense* is a category of shared expense which can be assigned or allocated between non-IMTS and other services based on direct causal and/or beneficial relationships. For example, engineering expenses in support of outside plant are, in part, attributable to non-IMTS.

d. *Generally allocable expense* is a category of shared expense that benefits the total corporate entity and cannot be attributed on a direct cost causative basis to any particular service, e.g., costs of the Personnel and Executive Departments.

e. *Common plant facilities* or common plant are facilities used by both non-IMTS and other services.

6. AT&T describes the basic principles underlying the cost assignment procedures and methods in the Plan as follows:

a. Revenues and costs for non-IMTS will be accounted for in the appropriate regulated accounts but will be separately identifiable within those accounts.

b. All dedicated costs incurred for non-IMTS and all dedicated non-IMTS revenues will be directly assigned to non-IMTS.

c. Common plant facilities and expenses related to common plant facilities will be allocated between non-IMTS and other services based on the use of the facilities.

d. Expenses will be assigned to non-IMTS on a fully allocated basis, i.e., they will include all dedicated expenses for the service and an appropriate portion of shared expenses.

e. Revenues and costs for non-IMTS will be separately identified and segregated after the jurisdictional separation process.

f. The revenue and costs for non-IMTS will not be included in any future reports or filings which measure the rate of return for non-streamlined regulated activities.

g. The Plan will be consistently applied and will be auditable.

7. The approach used in the identification and allocation of non-IMTS costs is as follows: (1) plant facilities dedicated solely to non-IMTS use are identified; (2) common plant facilities are identified and allocated to non-IMTS based upon use; (3) the decicated non-IMTS expenses are identified; (4) the attributable expenses are identified; of these, property-related expenses are allocated in proportion to the investment in non-IMTS plant, expenses generated by employees involved directly in the sales or administration of non-IMTS are assigned based on direct measures of their activities and the expenses of support personnel are allocated in proportion to the directly assigned expenses; and (5) generally allocable expenses, which benefit the entire corporate entity, are identified and allocated by applying overhead loading rates to the salary and wage portion of the total expenses assigned to non-IMTS.

8. The Plan sets forth in detail the principles and methods that will be applied to ensure that costs are properly assigned to both non-IMTS and other services. In addition to addressing the cost and revenue identification process, the Plan includes a description of the accounting systems used to identify and assign non-IMTS associated costs each month. The management and accounting controls to be used to monitor the cost identification process for non-IMTS are also discussed in the Plan.

IV. PLEADINGS OF INTERESTED PARTIES AND DISCUSSION OF ISSUES

9. Comments critical of the Plan were filed by GTE Service Corporation (GTE), MCI International, Inc.(MCI), RCA Gobal Communications, Inc. (RCA Globcom) and TRT Telecommunications Corporation (TRT). AT&T filed reply comments. Summaries of the comments and discussion of significant issues raised therein are presented below.

A. Relationship to the Joint Cost Notice (Docket 86-111)

10. On April 17, 1986, the Commission issued its *Joint Cost Notice*, seeking comment on: (1) methods of separating costs of regulated and nonregulated activities of telephone companies; (2) rules for transactions between regulated telephone companies and their nonregulated affiliates; and (3) amendments to the Uniform System of Accounts (USOA) requirements for nonregulated activities. The purpose of that proceeding is to develop generic cost allocation rules and procedures applicable to all of the nonregulated activities of local exchange carriers and of dominant interexchange carriers. Comments on the *Joint Cost Notice* w ere filed by June 30, 1986, with replies by July 30, 1986.

11. GTE asserts that the Plan should be subject to the outcome of the *Joint Cost Proceeding*. In a similar vein, MCI argues that, in order to insure that all costs of AT&T are properly reported and allocated to the appropriate services and products, the Commission should require AT&T to file a single, integrated Accounting Plan that would include all existing cost allocation plans, including those used for shared administrative services, installation and maintenance, customer premises equipment, IMTS/non-IMTS separations, as well as any other services that may be subject to separate cost allocation plans in the future. MCI suggests that such integration would assure ccnsistency among the various methodologies and help ensure that there are no gaps or overlaps among the different plans.

12. *The Joint Cost Notice* did not include any proposals for separating the costs of services subject to streamlined regulation from the costs of fully regulated services. However, it is apparent that the cost allocation and accounting issues raised by AT&T's Plan are identical to issues which are under consideration in the *Joint Cost Proceeding*. There is also an undeniable logic to the proposition that the same allocation methods and techniques used for distinguishing regulated and non-regulated activities should apply to separating the cost of services subject to streamlined regulation. Therefore, after the Commission has completed the *Joint Cost Proceeding*. we will consider whether to extend the principles and methods adopted there to regulated services which are subject to less than the full panoply of regulation.

B. Allocation of Costs of Land-line Facilities (LLF)[11] between Non-IMTS and AT&T's Fully Regulated Services

13. Under AT&T's Plan the book costs of land line facilities used to connect AT&T's gateway switching centers with the cableheads or earth stations would be allocated between non-IMTS and AT&T's fully regulated services based on use. MCI argues that this allocation method is discriminatory in that it allows AT&T an illegal cost advantage over non-IMTS providers who pay AT&T's tariff rates for use of those same facilities. MCI urges the Commission to require AT&T to charge itself the tariff rate for land line facilities used for non-IMTS. Simiarly, RCA Globcom asserts that AT&T's "nearly complete bottleneck control" of facilities that access international circuits invariably gives it a cost advantage that its competitors cannot recoup on the international portion of their services. According to RCA, the optimal approach would be to require AT&T to develop an "availability charge" for network facilities that at would approximate the costs that would be borne by a non-IMTS carrier entering the market. RCA states that tariff rates for land line facilities would be an acceptable proxy for such an availability charge.

14. In response, AT&T argues that the Commission has already properly rejected the claim that AT&T has bottleneck control of land line facilities. AT&T also states that the *International Competitive Carrier Order* "expressly rejected" use of a separate subsidiary structure, which would have required use of tariff rates instead of cost allocations, for AT&T's non-IMTS.

15. Initially we note that the parties do not allege that AT&T's plan f *a* ils to protect other ratepayers from absorbing some of the costs of non-IMTS. Indeed, assuming that AT&T's tariffs for its land line facilities are cost-based, the ratepayers for fully regulated services are in the same position under AT&T's cost allocation proposal as they would be under MCI's tariff rate proposal. Rather, MCI anc RCA Globcom are seeking to have the Commission impose the tariff rate method on non-IMTS in order to protect competitors from AT&T's alleged

ability to carry out a "price squeeze" by charging competitors more to use land line facilities than it "charges" itself for use of those facilities.

16. The Commission has on occasion imposed the type of costing constraint sought by MCI upon the non-structurally separate, regulated, competitive activities of a dominant carrier.[12] however, it has done so only upon finding that such constraints were necessary to prevent a carrier from eliminating competition by charging competitors so much for necessary facilities that the competitors could never match the carrier's price for the competitive service. In this proceeding, the Commission has already found that its regulation of the tariffs under which land line facilities are offered is adequate to prevent possible abuses based on AT&T's control of these facilities.

17. We would be concerned, however, if it appeared that the costs being allocated to non-IMTS for use of land line facilities were lower than the costs underlying the tariffs under which MCI and others obtain the use of those facilities. In order to facilitate comparison of costs allocated under the Plan with costs used in developing tariff rates, we require AT&T to maintain records which isolate and identify the land line facility costs being allocated to non-IMTS.

C. Reporting Requirements for Non-IMTS

18. In its Plan AT&T states that it will not include the revenue and costs for non-IMTS in any future reports or filings which measure the rate of return for non-streamlined regulated activities. In support of this proposal AT&T makes these arguments: (1) failure to remove non-IMTS earnings would distort the earnings results for fully-regulated services; (2) since the Commission has found that market forces will prevent any carrier from realizing excess earnings from non-IMTS, there is "no legitimate reason" for any carrier to report non-IMTS earnings to the Commission; and (3) since AT&T is non-dominant in non-IMTS, it should be on the same rooting as other non-dominant carriers, who do not report earnings to the Commission.

19. In response to this proposal, MCI, RCA, and TRT argue that AT&T should be required to continue reporting non-IMTS data. MCI believes reporting is needed both to allow the Commission independently to calculate the rate of return on fully regulated services and to allow the Commission to monitor cost allocations made under the Plan. RCA Globcom and TRT contend that the Commission needs rate-of-return information on non-IMTS in order to determine whether these offerings are being cross-subsidized by fully regulated services.

20. AT&T responds by stating that additional reporting is unnecessary, improper, and contrary to the purpose of streamlining regulation. It asserts that the Commssion will be able to determine that cost allocations are appropriate from the Plan and that it has the authority to audit the cost allocations as appropriate. Further, AT&T states that separate reporting may force the disclosure of detail of the cost and price structure of AT&T's non-IMTS which competitors could use to their competitive advantage.

21. We agree with AT&T that non-IMTS earnings should not be included in reports of earnings on fully-regulated activities. However, we also agree with MCI that the Commission needs data on costs allocated to non-IMTS in order to monitor AT&T's implementation of its Plan. Therefore, we require AT&T to maintain, for each account affected by the Plan, data indicating the costs that were apportioned to non-IMTS offerings during each calendar quarter. This data should be reported to the Commssion annually. AT&T should also maintain quarterly revenue data for its non-IMTS; this data shall be made available to Commssion staff upon request.[13]

D. Relationship of Cost Allocations to Jurisdictional Separations

22. In its Plan AT&T states that revenues and costs for non-IMTS will be separately identified and segregated after the jurisdictional separations allocations have been made. AT&T states that this is necessary because non-IMTS is still a regulated service; as such, its costs must be recorded in regulated accounts and separated between the state and interstate jurisdictions in accordance with Part 67 of our Rules.[14]

23. As part of its plea for a single, integrated accounting plan for a11 of AT&T's non-rate base activities,[15] MCI suggests that costs be allocated to streamlined-regulated services before the jurisdictional separations allocations are made. MCI believes pre-separations allocations are necessary to avoid application of the "artificial" allocations which characterize the current Part 67.

24. We agree with AT&T that the current Part 31 and Part 67 Rules require that the costs of streamlined-regulated services such as non-IMTS be booked to regulated accounts and jurisdictionally separated. It is, therefore, necessary and appropriate to apply the Plan after separations. However, we also share MCI's concerns about the proper relationship between jurisdictional separations and other cost allocation processes. Similar concerns were raised in the *Joint Cost Notice* and have been commented upon by interested parties. It may be necessary to reevaluate this accounting plan in the future in light of conclusions reached in other cost allocation proceedings.

E. Facilities from Customer Premises to Gateway

25. AT&T states that facilities from customer premises to the gateway are not included in the Plan because those facilities are provided separately under domestic tariffs. MCI questions whether the customer actually obtains two separate services, since, according to MCI, it is common industry practice for a U.S. customer to purchase a single service from its premises to the theoretical international midpoint. MCI argues that if AT&T provides a single, bundled service, it should charge the tariff rates for the domestic link to its non-IMTS activity. In reply, AT&T reiterates that it supplies the domestic segment on an unbundled basis.[16] Therefore, we will not require a revision in the Plan.

F. Allocation of Spare Circuits for Lands End Out

26. In its Plan AT&T proposes to allocate spare circuits of lands end out cable facilities[17] based upon an analysis and aggregation of cable investments in each of its three regions, i.e., Atlantic Ocean, Pacific Ocean, and Caribbean. MCI objects to this allocation procedure because it believes allocations of spare circuits by cable is practical and would be more accurate than regional aggregations and allocations. In its reply comments AT&T states that MCI "ignores tha regional nature of spare" and that actual utilization of an individual cable is not necessarily representative.

27. We agree with MCI that a cable by cable allocation of spare circuits is both practical and preferred. AT&T does maintain records of spare circuits by undersea cable, and individual cable allocations can be readily determined from these records. Furthermore, we believe it is important to do so since the newer, more expensive, and more technologically advanced cables (and associated electronic equipment) are more likely to be useo for non-IMTS than the older, lower-cost, less technologically advanced cables.[18]

G. Allocation of Plant Supporting LLF Facilities

28. In its Plan AT&T proposes to allocate land, buildings, and furniture associated with the LLF on the same basis that LLF is allocated i.e., mileage band cost analysis. MCI disagrees with this procedure, stating that these costs appear to have no relationship to mileage or distance, and suggests that use would be a more appropriate allocator. AT&T responds by arguing that these costs are in fact related to mileage. 29. Although MCI disagrees with the use of mileage band analysis to allocate the land, buildings, and furniture supporting LLF, it does not dispute AT&T's contention that the central office equipment and outside plant associated with LLF is distance sensitive. We believe that MCI's objection is unfounded. If, for example, longer circuits have more central office equipment associated with them than shorter circuits,[19] it would be appropriate to allocate more building space (i.e., to house the additional equipment), land, and other support costs to these circuits. We, therefore, agree with AT&T's proposed allocation procedure for the support plant.

H. Adequacy of Methodology Descriptions

30. MCI and TRT argue that certain of the methodologies used to allocate shared expenses to non-IMTS are not descried in sufficient detail in the Plan. We have reviewed the Plan in detail and determined that it contains sufficient detail for us to meet our fundamental goal of guarding against cross-subsidy of streamlined activities by fully regulated activities. Many of the issues involved here are also under consideration in the *Joint Cost Proceeding*, including the level of detail to be required in cost allocation plans. When the *Joint Cost Proceeding* concluded we intend to reexamine the Plan and determine what additional detail, if any, is necessary. In the interim, however, we are convinced that the level of detail provided in the Plan is adequate for our present purpose.

I. Revenues as an Allocation Factor

31. AT&T proposes to allocate "generally allocable" advertising expense[20] based upon the ratio of non-IMTS billed revenue to interstate billed revenue. MCI argues that revenues are not appropriate allocation factors because revenues bear no relationship to cost causation factors. MCI suggests that a measure of usage would be a more appropriate manner in which to allocate generally allocable expenses. In its reply comments, AT&T asserts that the costs in question are relatively minor and that revenues are a reasonable and readily available allocator reflecting the beneficial and causal relationships of these costs to non-IMTS.

32. We disagree with AT&T. We do not believe there is necessarily a causal relationship between generally allocable advertising expense and revenues. Moreover, the Commission has directed companies to allocate generally allocable advertising expenses based on total attributable expenses in other proceedings.[21] Likewise here, we direct AT&T to allocate generally allocable advertising expenae based on total attributable expenses.

J. Specific Identification of Non-IMTS Revenues

33. AT&T indicates that certain of its revenue accounts[22] re "Common and Shared" accounts. MCI asserts that there is no apparent reason why non-IMTS revenues and uncollectible balances ralated to those revenues cannot be specifically identified. We agree with MCI that, to the greatest extent possible, revenue accounts should be directly assignad to non-IMTS and other activities and not allocated based upon a general allocator. We, therefore, direct AT&T to maintain records which identify and isolate the portion of the revenue accounts associated with non-IMTS and other services separately.

K. Reversals of Deferred Taxes

34. In its Plan, AT&T proposed to allocate a portion of Accounts 308.1 and 309-01[23] based on the current ratio of non-IMTS to total interstate telephone plant in service. MCI argues that it is not appropriate to allocate reversals of deferred taxes using the current plant ratio because the deferred taxes had been originally allocated using past plant ratios. MCI suggests that some type of moving average or tracking of vintages may be more appropriate.

35. In its reply comments, AT&T states that accounting for moving averages or tracking of vintages for the assignment of the reversals of previously deferred income taxes to non-IMTS would require maintaining records and analyzing the tax deferrals and their reversals for hundreds of vintage groups. The process would be extremely burdensome and unnecessary. Further, AT&T suggests that a significant mismatch would only occur if there were a substantial change in the proportional relationships of AT&T's plant accounts, which is highly unlikely because of the substantial embedded investment in each plant category.

36. We agree with AT&T that it is unlikely a significant mismatch will occur, given the substantial embedded investment in each plant category. Therefore, we do not believe the additional burden of requiring a moving average procedure to fine tune the allocation is justified in this instance.

L. Ratio Updates

37. AT&T's Plan calls for an annual update of the usage ratios used to determine many of the allocations. MCI objects to this proposal stating that the allocations will be outdated quickly if growth in IMTS and non-IMTS facilities and services do not parallel each other. MCI suggests that the usage ratios should be updated at least quarterly. AT&T responds that it provides the Commission with a monthly report which contains the circuit usage factors which underlie the allocations proposed in the Plan. Further, AT&T states it will monitor the ratios and make changes as appropriate.

38. We direct AT&T to submit an additional copy of the monthly report containing circuit usage data to the Bureau's Accounting and Audits Division. We will review these reports and if we find that the ratios are changing substantially, we may order AT&T to revise its allocation factors more frequently than once per year. In the interim, we will presume an annual update is adequate.

M. Other Issues

39. MCI raises a few other issues, among them the propriety of allocating software costs based on different subaccounts of test desk work, and the need for more detail on the proposed assignment of common or indirect employee related expenses. We have considered MCI's position on these issues, but conclude that there is no basis for requiring such changes in the Plan at the present time. However, we intend to monitor AT&T's activities regarding these and other activities and will require changes if we find sufficient evidence that, subsequent to implementation, the Plan instructions are inadequate. In the interim we find AT&T's positions on these issues to be acceptable.

V. CONCLUSION

40. In the *International Competitive Carrier Order*, the Commission concluded that it can successfully eliminate unnecessary and burdensome regulations, benefitting both carriers and users. It also concluded that the growth in competition in the international telecommunications market makes it proper to rely increasingly on market forces and to streamline the regulations for non-dominant carriers. This will allow carriers to operate more efficiently and will allow them to better respond to customers' needs. We have reviewed AT&T's Plan and the comments thereon, and find that the Plan is substantially consistent with the objectives established by the Commission in the *International Competitive Carrier Order*.

VI. ORDERING CLAUSE

41. Accordingly, IT IS ORDERED, That AT&T's Plan IS ACCEPTED, subject to the information requests and modifications specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] International Competitive Carrier Policies, CC Docket No. 85-107, FCC 85-585 (released Nov. 15, 1985) at paragraphs 54 and 61 (*International Competitive Carrier Order*).

[2] As stated in footnote 6 of the *International Competitive Carrier Order*, examples of non-IMTS services are telex, telegram, TWX, private line, high and low speed data, video conferencing, and International Business Service.

[3] *See* Separation of Costs of Regulated Telephone Service from the Costs of Nonregulated Activities, Notice of Proposed Rulemaking in CC Docket No. 86-111, FCC 86-146 (released April 17, 1986) (*Joint Cost Notice*).

[4] *International Competitive Carrier Order* at para. 84.

[5] Primary service providers for noncontinguous points are, for example, Hawaiian Telephone for Hawaii and RCA Globcom for Guam. *6 47 C.F.R. Sec. 1.773(a)(ii) (1985).*

[7] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), recon. FCC 83-69, released March 21, 1983; Second Further Notice of Proposed Rulemaking, FCC 82-187, released April 21, 1982; Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983); Third Report and Order, Mimeo No. 012, released October 6, 1983, 48 Fed. Reg. 46,791 (October 15, 1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, FCC 84-82, released March 22, 1984, 49 Fed. Reg. 11,856 (March 28, 1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd MCI v. FCC, 2d 1186 (D.C. Cir. 1985). *8 See* International Competitive Carrier Policies, FCC 86-339 (released August 7, 1986), para. 20 (denying, on reconsideration, challenge directed towards this procedure).

[9] International Competitive Carrier Policies, Order, CC Docket No. 85-107, Mimeo 3513 (released April 1, 1986).

[10] The term "shared expenses" is used in the Plan instead of the Commission's terminology of "joint expenses" in describing certain expenses.

[11] These facilities include the gateway and the transmission path from the gateway to the cablehead or earth station.

[12] *See, e. g.*, First Report and Order in Docket No. 80-183, 89 FCC 2d 1337, 1346 n.17 (1982); Petitions for Waiver of Section 64.702 of the Commission's Rules (*Computer II*), 100 FCC 2d 1057, 1093-95. 1104-1106 (1985).

[13] We do not intend to monitor rate-of-return on streamlined-regulated services, nor do we intend to apply to non-IMTS the rate-of-return test for cross-subsidy suggested by TRT. However, we may need revenue information in order to evaluate complaints concerning the pricing of AT&T's non-IMTS.

[14] AT&T notes that this treatment differs from the accounting procedures that apply to nonregulated services. Under current Part 31 Rules nonregulated costs are transferred to nonregulatad accounts prior to the application of Part 67.

[15] See paragraph 11, above.

[16] AT&T cites, for example, AT&T Tariff FCC No. 9 Section 8.3.

[17] "Lands end out" cable facilities include the cablehead and international cable to the point at which facilities are provided by the foreign correspondent. *See* AT&T Plan at page 9. *18 For example, many high speed transmission requirements cannot be effectively accommodated with the older vintage cables.*

[19] In its reply comments AT&T references studies which show this to be the case, and we believe it is reasonable to assume that longer circuits are likely to have more central office equipment such as repeaters.

[20] "Generally allocable" advertising expense in this instance is that portion of Account 642 (Advertising Expense) which is not specifically attributable to non-IMTS.

[21] *See*. e.g., AT&T, Manual and Procedure for Allocation of Costs, 84 FCC 2d 384 *modified*, 86 FCC 2d 667 (1981), *aff.* ' *d sub nom.* MCI Telecommunications Corp. v. FCC, 675 F. 2d 408 (D.C. Cir. 1982).

[22] Account Nos. 512, Toll Private Line Services, 516, Other Toll Service Revenues, and 530, Uncollectible Operating Revenues.

[23] Account 308.1 is Operating Federal Income Taxes Deferred-Accelerated Tax Depreciation, and Account 309-01 is Accelerated Tax Depreciation.

Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 86-336

In the Matter of

Inquiry into the Scrambling
of Satellite Television Signals
and Access to those Signals by
Owners of Home Satellite Dish
Antennas

ORDER EXTENDING DEADLINE FOR FILING REPLY COMMENTS

Adopted: October 30, 1986 Released: October 30, 1986*

By the Chief, Office of Plans and Policy

1. The Commission has received a "Request for Extension of Time" for reply comments in the above-captioned docket. The National Cable Television Association filed this request on October 29, 1986, asking for a one-week extension.

2. Good cause for an extension having been shown, IT IS ORDERED that effective October 30, 1986, the deadline for reply comments in General Docket No. 86-336 is extended to November 10, 1986. Action is taken pursuant to Section 4(i) of the Communications Act of 1934, as amended, under authority delegated to the Chief, Office of Plans and Policy by Section 0.271 of the Commission's Rules, 47 C.F.R. Section 0.271.

FEDERAL COMMUNICATIONS COMMISSION

Peter K. Pitsch
Chief, Office of Plans and Policy

* Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEPHONE UTILITIES
EXCHANGE Transmittal No. 49
CARRIER ASSOCIATION

Petition for Waiver of Part 69
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: November 6, 1986; Released: November 7, 1986*

By the Deputy Chief, Common Carrier Bureau:

1. The Telephone Utilities Exchange Carrier Association (TUECA) has filed a petition for waiver of Section 69.4(b) of the Commission's Rules, 47 C.F.R. § 69.4(b), to allow the establishment of a separate rate element for the recovery of costs incurred in providing 800 NXX Access Service (800 Service). For the reasons stated below, we grant TUECA's petition.

2. TUECA states that a separate rate element is necessary to allow recovery of certain network modification costs incurred to provide 800 Service to interexchange carriers. TUECA points out that Part 69 of the Commission's Rules does not permit such a nonrecurring charge.[1] TUECA proposes to recover these costs by imposing a separate, nonrecurring charge on the users of 800 Service and has filed tariff revisions to implement this proposal.[2]

3. We find that the public interest will be served by grant of the requested waiver. We conclude that granting this waiver request would be consistent with the Commission's policies regarding access charges in that it assures that the costs of service are recovered from the cost-causer. This waiver is similar to others which have recently been granted.[3]

4. Although we are permitting TEUCA's tariff revisions to become effective as scheduled, its tariff remains subject to the outcome of our proceeding in CC Docket No. 86-279.[4] That proceeding was initiated to determine the appropriate separations methodology to apply in the development of the costs associated with interim 800 Service. TUECA proposes to allocate 800 Service investment and related expenses based on a methodology similar to that under investigation in that proceeding.

5. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules to establish a separate rate element to recover 800 Access Service costs, filed by the Telephone Utilities Exchange Carrier Association on October 16, 1986, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* 47 C.F.R. § 69.4(b).

[2] *See* TUECA Transmittal No. 49, filed on September 25, 1986. No petitions have been filed against this transmittal. The proposed tariff revisions are scheduled to take effect on November 9, 1986.

[3] *See* Petitions for Waiver of Part 69 to Provide Exchange Access for 800 Service, Memorandum Opinion and Order, Mimeo No. 4560, released May 16, 1986, at para. 11.

[4] *See* Interim 800 Exchange Access Tariffs, Memorandum Opinion and Order Designating Issues for Investigation, Mimeo No. 5586, released July 3, 1986.

* Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

AT&T
COMMUNICATIONS, INC. Transmittal No. 723

Revisions to Tariff F.C.C. Nos. 9
and 11

MEMORANDUM OPINION AND ORDER

Adopted: November 6, 1986; Released: November 7, 1986*

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff revisions were filed by AT&T Communications, Inc. (AT&T) on September 25, 1986 and are scheduled to take effect on November 9, 1986. The captioned transmittal revises the cancellation charges imposed by AT&T in cases in which customers cancel orders for private line service prior to the initiation of service.

2. Petitions for rejection or suspension of the tariff revisions were filed by Aeronautical Radio, Inc. (ARINC) and the Ad Hoc Telecommunications Users Committee (Ad Hoc).

3. ARINC and Ad Hoc both argue that the captioned revisions will increase AT&T's private line earnings which, they assert, already exceed AT&T's authorized rate of return. In addition, both petitioners note that AT&T's local channel cancellation charges are based on local exchange carriers' (LECs) nonrecurring charges (NRCs) which are currently under investigation.[1] Ad Hoc further argues that allowing AT&T's revisions to become effective would remove cancellation charges from the investigation of AT&T's private line tariffs.[2] Finally, Ad Hoc contends that the revisions are unlawfully ambiguous.

4. The Common Carrier Bureau has reviewed the tariff and the petitions filed by the above-listed petitioners. We find that no compelling argument has been presented that the tariff revisions will cause AT&T to overearn; that the revisions are ambiguous; or that allowing these revisions to become effective will prejudge our pending special access or private line investigations. As we have found in the past, AT&T is, in fact, earning significantly less than its authorized rate of return.[3] Furthermore, we do not find the captioned revisions to be ambiguous.[4] Finally, allowing AT&T's proposed cancellation charges to take effect will not prejudge the aforementioned pending investigations. The local channel cancellation charges imposed by AT&T under its Tariff F.C.C. No. 11 simply flow through charges that AT&T pays LECs when a private line service order is cancelled.[5] Moreover, we will impose an accounting order on any revenues received by AT&T through imposition of its revised cancellation charges. In the event that the nonrecurring costs on which AT&T has based its revised cancellation charges are found in the private line investigation to be overstated, we will require AT&T to make refunds as appropriate. We therefore conclude that the arguments raised in the petitions filed by the above-listed petitioners do not warrant rejection, suspension or investigation of the tariff.

5. IT IS THEREFORE ORDERED, that the petitions filed against AT&T Communications, Inc. Tariff F.C.C. Nos. 9 and 11, Transmittal No. 723, by the above-listed petitioners ARE DENIED.

6. IT IS FURTHER ORDERED pursuant to Section 220(a) of the Communications Act, 47 U.S.C. § 220(a), and the authority delegated under Section 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(a) and 0.291, that an accounting order is imposed on AT&T Communications, Inc. with respect to the captioned transmittal. AT&T Communications, Inc. shall separately account for revenues, costs, investment and net earnings associated with the cancellation charges revised by the captioned transmittal.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, FCC 85-52 (released Jan. 24, 1986).

[2] Investigation of AT&T Communications, CC Docket No. 85-400, Mimeo No. 1740 (released Jan. 7, 1986).

[3] *See AT & T Communications, Inc.*, Mimeo No. 3733 (released Apr. 11, 1986).

[4] AT&T has stated that it will inform its customers that they can obtain the "critical dates" for application of its revised cancellation charges by contacting their AT&T service representatives. AT&T Application for Special Permission No. 336, filed Oct. 31, 1986.

[5] We note that AT&T will have to revise these charges in the event that the LECs are required to revise their NRCs.

* Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T
COMMUNICATIONS Transmittal Nos. 716 and 751

Revisions to Tariff F.C.C. No. 1
(Custom Switched Network Service)

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 1986 Released: November 10, 1986*

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By the above-listed transmittal, AT&T Communications (AT&T) has filed tariff revisions proposing a new service option in its MTS tariff called Custom Switched Network Service (CSNS). The revisions were filed on September 18 and are scheduled to become effective on November 12, 1986.[1] Petitions to suspend and investigate were filed by US Sprint Communications Company (Sprint) and Southwestern Bell Telephone Company. ALC Communications Corporation (ALC) filed a petition to reject or to suspend and investigate. For the reasons explained below, we are denying the petitions and permitting the tariff revisions to become effective as filed.

II. TARIFF DESCRIPTION

2. CSNS is a new service filed in AT&T's MTS tariff for interstate dial out calls. AT&T states it has designed CSNS to be attractive to AT&T WATS customers who currently have between 25 and 1,000 hours of usage each month. CSNS is designed as an end-to-end service that uses local exchange carrier switched access and includes recurring, nonrecurring and usage-based charge elements. CSNS is offered under two different options, with Option I having a lower flat monthly rate and a higher usage rate schedule than Option II. Specifically, customers of Option I will pay a flat monthly rate of $115 and an average per minute rate of $.288 during the day rate period, with rates for calls in the evening and night/weekend period reflecting an average discount from day rates of 30 percent to 50 percent, respectively. Customers of Option II will pay a flat monthly rate of $450 and an average per minute rate of $.255 during the day rate period, with the rates for the evening and night/weekend period reflecting an average discount of 25 percent and 45 percent, respectively.[2] Both options assess a nonrecurring service ordering charge of $10.00. The rates for CSNS are, on an average, 8 to 10 percent above current WATS rates, including a *pro rata* portion of the flat monthly recurring charge.

3. AT&T states in its Description and Justification (D&J) that the service is designed for AT&T's customers who currently purchase WATS but would be attracted to a competitively priced custom network service that uses local exchange switched access rather than dedicated access and that provides additional features, such as message-detail billing. AT&T expects Option I to be attractive to AT&T customers who currently have between 25 and 200 hours per month of interstate dial usage and Option II to be attractive to its customers who currently have between 200 and 1000 hours per month of interstate dial usage. AT&T also suggests that it has designed this service to compete with similarly designed offerings of its interexchange competitors.

4. AT&T has stated in its transmittal letter that, based on conservative estimates, CSNS will increase profits for AT&T by over $2.5 million in 1988. It states further that this increased profitability will benefit all of AT&T's switched service ratepayers by permitting lower rates than would otherwise be possible. AT&T has provided its cost support data both to satisfy the fully distributed cost methodology and the net revenue test set forth in the *MTS Guidelines Order* for optional calling plans.[3]

III. PLEADINGS

5. The petitioners generally attempt to show that AT&T's cost support materials lack sufficient detail and thoroughness to justify its CSNS offering. Petitioners specifically raise concerns regarding the accuracy of the market survey and the use of an improper elasticity factor by AT&T in projecting stimulation. Both Sprint and ALC assert that they and the Commission need to know actual survey questions and more information about the survey in order to be able to assess the accuracy of the demand and revenue forecasts. Sprint asserts that the marketing research is not sufficiently reliable and that AT&T has not taken into account the probability of error in assuming all respondents who indicated they would buy CSNS actually will. Sprint also states that AT&T failed to provide the coefficient of cross elasticity assumed and the coefficient of demand elasticity used to stimulate CSNS traffic.

6. The petitioners raise two concerns with regard to AT&T's calculations of the non-traffic sensitive cost (NTS) savings that will result from the introduction of CSNS. Sprint and ALC assert that AT&T overstated its NTS savings by failing to exclude the loss of the special access surcharge revenues from the WATS access lines that will be displaced as demand shifts from WATS to CSNS. Sprint also asserts that AT&T has overstated its NTS cost savings by using the currently effective carrier common line (CCL) rate of 3.04 cents per minute for originating traffic, because that rate was expected to be reduced by the National Exchange Carrier Association's (NECA) October 3, 1986 annual access tariff filing.[4]

7. Sprint also finds fault with AT&T's non-access cost data. It alleges that AT&T has not explained why its non-access costs for incremental minutes of use are on an average 25 percent greater than for AT&T's Pro America service.[5] Sprint states that it limited its examination to categories that it thought would not include start up costs and would not be directly proportional to additional use. It concludes that with the exception of maintenance, all of the other categories it examined are between 17 and 62 percent less per conversational minute of use than Pro America.

8. Generally, AT&T replies that the petitioners have ignored its series of extremely conservative assumptions which acted to understate significantly the profitability of this service. Specifically, AT&T assumed that only 27 percent of purchasers identified by the survey would actually purchase CSNS by the end of 1988 and less than

half would purchase it by the end of the third year. AT&T also assumed that no demand stimulation would occur from customers who realized a price reduction from CSNS. Furthermore, AT&T indicates that its WATS "saves" analysis conservatively excluded the benefit to AT&T of MTS overflow usage from WATS "saves" customers, and did not include any stimulation in its calculations for CSNS. Finally, AT&T asserts that its cost data are accurate.

IV. DISCUSSION

9. We have reviewed the tariff, the accompanying cost support data, and the petitions filed by the above-listed petitioners. We do not find that any of the arguments presented by the petitioners raise concerns that the tariff revisions establishing CSNS are unreasonable. Our review indicates that AT&T has used reasonable assumptions in calculating the demand and revenue forecasts for this new service offering and that this service will not burden other ratepayers.

10. The most serious charge raised by the petitioners, that AT&T used inappropriate elasticity factors, is based upon a misreading of AT&T's Description and Justification. As AT&T showed in its cost support materials and repeated in its reply, it assumed no demand stimulation whatsoever in its financial analysis "in the interest of providing a conservative estimate of the profitability of the service."[6] AT&T did explore in a footnote the impact on demand and revenues that might result in cases where customers experienced a rate decrease. These calculations, however, were simply additional information and not part of the demand and revenue forecasts used to justify the service.[7]

11. Furthermore, we do not agree with the petitioners that additional information is necessary with regard to the market survey. The information supplied by AT&T provides an adequate basis for evaluating its survey results. It does not appear that the market survey here is in any way inferior to that used by AT&T in its Pro America filing.[8] While certainly there are circumstances under which we could justify looking behind the results of a survey used as a basis for a carrier's forecasts, petitioners have not presented any arguments here that suggest that it would prove fruitful to do so in this case. As in the case of Pro America, the petitioners have not challenged the qualifications or conclusions of AT&T's marketing expert nor have they argued that this kind of survey is an invalid method for estimating consumer response to CSNS. Moreover, without any specific challenge to the survey results, we find no reason to ignore AT&T's legitimate interest in protecting its proprietary information. Finally, as indicated above, AT&T has used conservative estimates in formulating its demand forecasts from its survey results. As a result, we seriously question whether any information about the structure of the survey or the questionnaire used for the survey would lead us to conclude that the demand forecasts are overstated. Accordingly, we find that AT&T has adequately described its marketing survey for purposes of the present filing.

12. The petitioners' arguments with regard to the calculations of the non-traffic sensitive costs (NTS) do not present any questions of reasonableness either. In response to Sprint's and ALC's assertions that AT&T failed to exclude the loss of the special access surcharge revenues from the WATS access lines that will be displaced as demand shifts from WATS to CSNS, AT&T recalculated the net revenues for CSNS and the per minute CCL savings. AT&T resubmitted the affected pages from its D&J with its reply.[9] We conclude that, because AT&T has corrected its error, and the effect appears to be negligible in terms of the profitability of the service, there is no need to address this issue any further.[10]

13. With regard to Sprint's objection to the use of the current CCL rate in calculating the NTS savings, the critical issue is whether carriers can be expected to anticipate and predict changes in the factors upon which they base their filings and the resulting impact such changes might have on other factors used in their cost calculations.[11] We do not think that such speculation is useful or likely to be accurate. The Commission rejected a similar argument in the *PRO America Order*, stating that analysis of the potential impact of future changes required by Commission actions but having not yet occurred would be too speculative to be of value in evaluating the tariff.[12] We find that to be the case here as well. We can only analyze the filing in light of the facts as they existed at the time AT&T made its filing. While the new CCL rate ultimately was filed subsequent to AT&T's filing of the instant transmittal, it has not yet become effective; to anticipate the new rate and the impact it will have on the other data used in calculating the profitability of CSNS would require information that is at best, like the CCL rate itself, uncertain. Furthermore, as indicated by AT&T in its reply, the new rate is not scheduled to become effective until January 1, 1987, well after the current November 12, 1986 effective date for CSNS.

14. Finally, with regard to Sprint's argument that AT&T's non-access cost data are overstated, AT&T states that it used the same cost methodology in this filing as it did in its Pro America filing. In both its Description and Justification and its reply, AT&T explains that changes in network related expenses were calculated following AT&T's standard methodology using the Network Cost System, described in TFP 1505 and the Network Prospective Costs System methodology, described in TFP 1505 and 1503.[13] AT&T concludes that Sprint's argument merely illustrates the invalidity of comparing selective costs on a per minute basis and that Sprint ignores the fact that many costs do not vary directly as a function of minutes. AT&T uses gross receipts taxes, included in "Other Taxes," as an example to demonstrate that Pro America which has a higher gross revenue per minute may be expected to have a higher Other Tax expense on a per minute basis. Accordingly, we concur with AT&T that costs cannot be compared from service to service on a per minute basis. Furthermore, we conclude that there is nothing in the filing to indicate that the costs included by AT&T are not accurate.

V. CONCLUSION AND ORDERING CLAUSES

15. As discussed above, our review indicates that the petitioners have not demonstrated that the tariff is so patently unlawful as to warrant rejection. Nor have they raised any questions of lawfulness that would warrant suspension or investigation at this time. We have determined, however, that in order for us to monitor the effects of this new service upon AT&T's total switched services revenue, AT&T shall be required to file quarterly reports covering each quarter of the first calendar year after this service has become effective. The reports must be filed not later than 30 days after the end of each

quarter. The reports should compare the revenue and demand forecasts filed with this transmittal with CSNS's actual operating results.

16. IT IS THEREFORE ORDERED that the petitions submitted by ALC Communications Corporation, US Sprint Communications Company and Southwestern Bell Telephone Company ARE DENIED.

17. IT IS FURTHER ORDERED that AT&T Communications shall file a report with the Commission as indicated in paragraph 15, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Sections 43.51, 43.52, 43.53, 43.54 and 43.74 of the Commission's Rules to Eliminate Certain Reporting Requirements, CC Docket No. 85-346, 102 F.C.C. 2d 531 (1985). (NPRM)

[2] The following parties filed comments: Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), Comsat Internation Communications, Inc. (Comsat) Equatorial Communications Telecommunications Company (Equatorial), FTCC McDonnell Douglas Internation Telecommunications Company (FTCC), Hawaiian Telephone Company (Hawaiian), MCI Telecommunications Corporation (MCI), Office of Management and Budget (OMB), Overseas Telecommunications Corporation (OTI), RCA Global Communications (RCA), TRT Communications Corporation (TRT), and Western Union Telegraph Company (Western Union). (RCA's comments -- filed one day late -- were accompanied by a Motion to Accept Late-Filed Comments. We hereby grant RCA's motion and accept the comments as filed.) Reply comments were submitted by American Telephone and Telegraph (AT&T), Equatorial, Mountain, Northwestern and Pacific Northwestern Bell (MTN, NB and PNB), National Telecommunications Network (NTN), United Telephone Systems Inc., (UTS) and Western Union.

[3] Section 43.51 requires the filing of contracts between carriers for: (1) the exchange of services, (2) the interchange or routing of traffic and matters concerning rates and division of tolls, and (3) agreements with foreign governments.

[4] Section 43.52 requires the filing of a monthly report by each carrier engaged in foreign traffic covering all negotiations, whether written or oral, initiated during the previous month with any foreign administration or carrier.

[5] In accord with Section 43.53, carriers engaged in overseas telegraph communications are required to file a report describing the arrangements for division of tolls with the foreign countries involved.

[6] Section 43.53 also requires telegraph carriers to file reports for services not covered by a tariff. Such services include, but are not limited to, communications services wholly within or between foreign countries, leasing arrangements concerning wires leased to other communication carriers, errand services by messenger, time service and burglar alarm services.

[7] In accord with Section 43.74, carriers must file report of services rendered free or at reduced rates for noncommercial eduational television or radio services.

[8] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980), Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), Second Report and Order, 91 FCC 2d 1982), *recon.*, FCC 83-69, released Mar. 21, 1983, Second Further Notice of Proposed Rulemaking, FCC No. 82-187, released April 21, 1982, Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983), Third Report and Order, Mimeo No. 012, released Oct. 6, 1983, 48 Fed. Reg. 46,791 (Oct. 15, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fourth Further Notice of Proposed Rulemaking, FCC 84-82, released Mar. 22, 1984, 49 Fed. Reg. 11,856, Mar. 28. 1984), Fifth Report and Order, FCC 84-394, released Aug. 27, 1984, 49 Fed. Reg. 34,824 (Sept. 4, 1984), Sixth Report and Order, FCC 84-566, released Jan. 4, 1985, 50 Fed. Reg. 1215 (jan. 10, 1985), *rev'd sub nom.* MCI Telecommunications Corp. v. F.C.C., No 85-1030 (D.C. Cir 1985).

[9] We defined non-dominant carriers as those lacking substantial ability to control the marketplace and engage in anticompetitive practices proscribed by Sections 201-205 and 214 of the Communications Act. Dominant carriers are those which have the ability to profitably charge monopolistic, predatory or discriminatory prices.

[10] *See*, 47 U.S.C. § 208.

[11] NPRM at para. 3-4.

[12] NPRM at para. 7.

[13] We tentatively concluded in the NPRM that the reasons generally supporting our elimination of the reporting requirements discussed above were generally applicable to telegraph carriers and noncommercial educational television or radio services. Moreover, we reasoned that the elimination of the reporting requirements would make more equitable the treatment of telegraph and non-telegraph carriers. NPRM at para. 8

* Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

PACIFIC BELL AAD 6-1326

Petition for Waiver of Section
64.702 of the Commission's Rules
and Regulations to Authorize
Protocol Conversion Offerings

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1986 Released: December 3, 1986

By the Chief, Common Carrier Bureau

I. INTRODUCTION

1. On January 21, 1986, Pacific Bell (Pacific) filed a plan (the Compliance Plan) which purportedly demonstrates compliance with the requirements set forth in the Commission's *Protocol Waiver Order*.[1] Additionally, Pacific seeks a waiver of the separate subsidiary requirements of the *Computer II* rules[2] to permit joint marketing and billing of protocol conversion with its basic packet switching service. For the reasons set forth below, we accept Pacific's Compliance Plan and grant its joint marketing and billing waiver, subject to the conditions set forth herein.[3]

II. BACKGROUND

2. Under Section 64.702 of the Commission's rules common carriers may offer enhanced services, including protocol conversion,[4] on an unregulated basis and must obtain under tariff the basic services underlying their enhanced offerings. In the *Third Computer Inquiry*, the Commission replaced structural separation for the enhanced services of AT&T and the Bell Operating Companies (BOCs) with nonstructural safeguards.[5] However, the BOCs are still required to provide certain types of protocol conversion on a collocated basis only pursuant to the requirements set forth in the *Protocol Waiver Order*.

3. In the spring of 1984, several BOCs petitioned for waivers of Sec. 64.702 of the Commission's rules to offer an X.75 interface (an internetworking interface) within basic X.25 packet-switched networks, and to allow conversion of asynchronous transmissions to the X.25 protocol. Asynchronous-X.25 conversion allows most personal computers and many other kinds of asynchronous data terminals to communicate via packet-switched networks with host computers that send and receive data in the X.25 format. Specifically, the petitioners asked the Commission for permission to collocate protocol conversion equipment in their central offices and to waive most or all of the structural separation conditions which would ordinarily apply to an enhanced services offering by a BOC.

4. The Commission granted the X.25-X.75 proposals in November, 1984.[6] After requesting further information from the BOCs, it granted all but one of the waiver requests for asynchronous-X.25 protocol conversion.[7] The Commission concluded that the public interest would be served by allowing the BOCs to place asynchronous-X.25 protocol conversion capabilities within their central offices in order to achieve certain efficiencies which would significantly reduce data transport prices to customers. *Protocol Waiver Order* at 1090. It also found that permitting the provision of protocol conversion services within the network would enable the BOCs to serve customers not effectively served by existing packet switching providers. *Id.* Most importantly, the Commission believed that the diversion of data traffic from circuit-switched voice facilities onto more efficient local packet switched networks could eliminate the need for costly construction of new voice facilities which might otherwise be required to handle future increases in data traffic. *Id.* at 1089-90.

5. Notwithstanding these conclusions, the Commission noted that an unconditional waiver of the *Computer II* rules might present the BOCs with opportunities for misallocation of costs or other anti-competitive behavior. Therefore, the Commission limited the scope of the waivers to allow the BOCs only to place protocol equipment within their central offices and to install and maintain any such collocated equipment. It did not grant permission for the BOCs to market the protocol conversion services. Absent further showings, the Commission required the asynchronous-to-X.25 conversion services to be marketed through the enhanced services subsidiary, which would reimburse the telephone company for the investment and costs of providing the enhanced portion of the packet-switched services to the subsidiary. To that end, the Commission ordered each BOC to file an accounting plan designed to allocate to their separate enhanced services subsidiaries all direct and indirect costs associated with installing and maintaining the protocol equipment. *Id.* at 1099-1101.

6. In addition to the accounting requirements, the Commission placed three conditions on asynchronous-X.25 protocol conversion offerings. First, it required the BOCs to take the inter-office circuits used for their packet-switched networks on the same terms and conditions which govern the use of those circuits by their competitors. This condition is intended to prevent the BOCs from using their monopoly control over such circuits to "squeeze" out others who might wish to use the circuits similarly to provide enhanced packet-switched data transmission services. (See generally, *id.* at 1093-95, 1104-07).

7. Second, the Commission directed the BOCs to include in their basic (X.25) packet switching tariffs a network utilization rate element (NURE) which must be paid by the BOC's separate subsidiary when it uses basic service to provide a customer with enhanced (asynchronous-X.25) packet services. This condition is intended to charge users of the enhanced service for the costs of any operational inefficiencies which protocol conversion imposes upon the network. *Id.* at 1107-09. As an incidental effect, the price differential which the NURE creates between asynchronous-X.25 service and unconverted X.25-to-X.25 service also preserves the incentives for development of protocol conversion capabilities within customer premises equipment. *Id.* at 1095.

8. The Commission's third condition requires the BOCs to provide end users with equal access both to the protocol conversion offerings of the BOC's separate enhanced services subsidiary and to the protocol conversion

offerings of other service providers. This condition requires the BOCs to make such access available on an unbundled, tariffed basis, without discrimination between BOC protocol conversion facilities and those of others. In particular, it prohibits offering of data-over-voice (DOV) access to the BOC network unless the BOC offers DOV access to the offerings of other enhanced service providers. This requirement also mandates that "dialing parity" be made available on a comparable basis to other enhanced service providers. For instance, if abbreviated dialing is used to reach the BOC's packet-switched service, comparable dialing must also be available to customers of other enhanced service providers. *Id.* at 1109-12.

9. The third condition also affects the terms on which the BOC provides to its separate subsidiary the connections between the subsidiary's protocol conversion equipment and BOC subscribers. The collocation waiver permits these connections to be made using intra-office wire rather than local loops so that the BOC may derive cost savings equal to the difference between the tariff prices its affiliate will pay for the intra-office connections and the tariff prices which other packet switched service providers must pay for the loops through which they connect with BOC central offices. *Id.* This condition, therefore, requires the BOCs to identify and explain these cost savings in the support material accompanying their tariff revisions. *Id.* at 1104-07.

10. Finally, the Commission stated that it would grant further waivers allowing the BOCs to market protocol conversion jointly with basic packet switching if the following conditions are met:

> [E]ach BOC seeking approval of a specific marketing plan must make a probative and fully documented filing that demonstrates: (1) how the costs of marketing asynchronous format compatible packet services by unseparated telephone company personnel will be identified and excluded from "above the line" regulatory documents; (2) what marketing information, if any, will be available (and on what basis) to other enhanced service vendors to give them an opportunity comparable to that of the BOCs' unseparated marketing personnel to vend asynchronous format-compatible packet switched services to the BOCs' basic telephone service subscribers; and (3) how the petitioner's marketing proposals relate to conditions #2 and #3 which we are adopting herein.[10]
> (footnote ommitted.)

III. PACIFIC'S PROPOSAL

A. General

11. In 1985, Pacific introduced a new service called Dataphone Public Packet Switching Service (PPS). PPS is a data transport service utilizing packet switching technology and techniques based on the CCITT (International Telegraph and Telephony Consultative Committee) X.25 protocol and the X.75 protocols. The X.75 protocol allows interconnection to packet interexchange carriers, providing Dataphone customers the ability to access national services. The X.25 protocol is used primarily to interconnect central offices within the same LATA.

12. PPS is a premises to premises, optional intra-LATA switched data network service that functions by interfacing customer terminals or host computers with an access concentrator at the central office. These access concentrators convert customer data into "packets" and then route these packets via interoffice circuits to the BOC's packet switch. At the packet switch, the packets are then routed via local loops to the locations designated by the customers. The protocol determines how the packet is constructed, and what it must contain.

B. Accounting Plan

13. Pacific's accounting plan is described in Attachment D to its Compliance Plan. According to Pacific, this plan presents a comprehensive set of accounting procedures for its PPS that will identify all PPS revenues, costs, and investment, and will isolate that portion of PPS revenues and costs associated with carriage of net protocol conversion packets from revenues and costs for basic packets. Pacific states that the procedures in its accounting plan comply with Part 31 of the FCC's Rules and Regulations as amended in the Fifth Report and Order in CC Docket No. 81-893 (*Fifth Report and Order*), FCC 84-547 (released November 20, 1984). By implementing this plan, Pacific asserts, it will: (a) account for PPS service using appropriate cost accounting procedures; (b) isolate revenues and costs of the enhanced portion of PPS service from the regulated accounts to prevent cross-subsidy; and (c) will develop a clear audit trail.

14. Pacific states that it will follow specific accounting guidelines in accounting for all enhanced service. First, all revenues, costs, and investments associated with an enhanced service will be identified, including allocations of common overhead amounts. Second, costs and investments attributable to enhanced services will be reported directly wherever they can be practically identified. To be directly reported, the plant item or activity must be discrete, material, and product specific. Third, costs that are not directly reportable will be identified through causal attributions or clearly defined allocations. Finally, all accounting procedures will be documented, to produce clear audit trails.

15. Pacific will account for the direct investment in the enhanced and basic portions of PPS by using its existing accounting processes to identify the investment related to PPS. For example, switch investment and related circuit equipment will be tracked from Specific Estimates or Keep Costs Jobs to the appropriate subaccounts of Accounts 100.1 or 100.2. Capital investment will be reflected in field reporting codes (FRCs) and charged to the appropriate regulated subaccounts of Account 221. The investment will include all engineering, labor, materials, interest during construction and overheads. Since the PPS investment will support basic and enhanced services, Pacific will use a traffic related allocation factor to determine investment applicable to net protocol converted calls.[8] Pacific will then charge a monthly rental to the enhanced services to compensate basic operations for the enhanced services usage of investment. In accordance with the *Fifth Report and Order*, Pacific states, the investment related cost applicable to the enhanced services will be recorded in specific receivable subaccounts of Account 106, Nonregulated investments, and credited to the regulated Account 524, Rent Revenues. The net income effect applicable to net protocol conversion will be reported in subaccounts of Account 317, Income from nonregulated activities.

16. Pacific states that since the PPS network serves both regulated and nonregulated activities within the traditional central office environment, it is necessary to assign

a portion of the central office support investment related costs to protocol conversion. Accordingly, Pacific explains, each month net protocol conversion accounts will be charged an amount for the use of such support investment. First, the land, building, power and common equipment factor will be applied to the direct investment in PPS, then the traffic related allocation factor will be used with that derived amount to determine the land, building, power and common equipment used in the enhanced portion of PPS. An investment related cost loading will be applied to that value to determine the amount that will be charged to the appropriate receivable subaccount of Account 106, and credited to the regulated Account 524, Rent Revenues. Pacific also notes that all central office related investment will be augmented with loadings from common support investment. The loadings are derived using computed factors representing land, buildings, and power and common equipment as a percent of average gross central office switching equipment investment for the entire company. The land and building factors are developed biannually and the power and common equipment factors are developed annually.

17. Total expenses associated with packet switching and net protocol conversion, Pacific explains, will be identified and charged to the appropriate regulated or unregulated accounts. To accomplish this, Pacific states, it will identify expenses associated with packet switching and net protocol converted calls, record these expenses in the regulated accounts uniquely identifiable within the accounting process, separate them between basic and enhanced activities, move the fully loaded expenses associated with net protocol conversion to the nonregulated subaccounts of Account 106, and establish specific regulated credit subaccounts to reflect amounts transferred to the nonregulated accounts.

18. Pacific states that marketing expenses incurred in connection with the promotion and sale of both basic and enhanced services will be divided into two categories: (1) product management and sales force expenses and (2) advertising expenses. The former will be identified through the use of exception time reporting. Personnel will report PPS related work time that exceeds one-half hour per eight hour day plus any authorized PPS overtime. Payroll administrators will use unique Authority Codes to report those hours, and will maintain a copy of all time sheets to provide a clear audit trail. Nonsalary expenses incurred by sales personnel will be originated by the bearer of the expense and reimbursed through a Business Expense Voucher. Expenses related to PPS will be identified by a unique Authority Code, and those expenses not related to PPS will be vouchered using the standard cost accounting codes. Advertising expenses will be divided into the following three categories: product specific, expenses common to a group of products, and general company expense. Product specific expenses will be identified directly through the use of appropriate tracking codes. Common expenses will be identified through the use of tracking codes, then apportioned using a ratio of advertising expense common to PPS and other services to total group revenues, multiplied by PPS revenues. General company advertising expenses will be based on a factor derived by taking common advertising expenses over common revenues multiplied by PPS revenues from net protocol conversion.

19. To identify and track maintenance expenses, Pacific states, its maintenance personnel will use Keep Cost Orders to track all the maintenance, material, and labor expenses associated with the PPS network. This information will be summarized monthly and posted to the regulated accounts. The total monthly PPS maintenance expense then will be multiplied by the traffic related allocation factor to determine the amount of maintenance expenses to be transferred from the regulated to the unregulated accounts.

20. Pacific explains that appropriate overhead loadings will be applied to the PPS network expenses related to protocol conversion. These loadings will be credited to specific subaccounts established within each of the USOA accounts for which the loadings apply and debited to the appropriate nonregulated receivable subaccounts of Account 106.

21. Billing and collection expenses associated with protocol conversion, Pacific states, will be tracked in two ways. First, nonrecurring costs incurred specifically for NURE billing will be recorded using time sheets coded to a specific project code. Second, on-going production costs will be allocated on a monthly basis from the message processing and billing function Customer Record Information System (CRIS) expense bookings. Total bill lines associated with the enhanced portion of PPS will be determined by combining NURE and net protocol converted packet transport charge bill lines. To determine billing expenses for the enhanced portion of PPS, those bill lines are divided by total bill lines processed, and the resulting ratio is then applied to the total CRIS message processing and billing function expenses. The combination of net protocol conversion CRIS expense from direct reporting and the allocated production costs will be charged to the appropriate nonregulated subaccounts. Those collections expenses attributable to net protocol conversion will be based on a billed revenue ratio derived by taking the net protocol conversion and NURE revenues over total corporate billed revenues then applying it to Business Office and Final Account Collection Center Expenses.

22. Pacific explains that its accounting plan will identify and track all of the assigned interconnecting facilities and their corresponding tariff rate amounts. That portion associated with net protocol conversion will be separated by applying the traffic related allocation factor, and the resulting amounts will be charged to the appropriate receivable subaccount of Account 106 for nonregulated activities and credited to the regulated Account 524, Rent Revenues.

23. PPS revenues, Pacific states, will be billed for those services ordered out of the local tariffs including gateway services ordered from the California Public Utilities Commission (CPUC) and FCC access tariffs. Charges for the NURE will be included in the Automated Message Accounting (AMA) record for each sent-paid-dial-access call which accesses the PPS network through an asynchronous interface that terminates on an x.25 port. The NURE summary will be credited to a regulated revenue account along with other packet network revenues. Revenues for carriage of net protocol converted calls will be credited to a subaccount of Account 106.

C. Compliance with Collocation Conditions

24. As stated in paragraphs 6-9 above, the Commission imposed three conditions on the waiver which allows the BOCs to collocate protocol conversion facilities in their central offices.

25. Pacific has included on pp. 5-6 and Attachment A of its filing a demonstration of compliance with condition one, the treatment of interoffice channels. Pacific asserts it will obtain its inter-office channels under the same terms and conditions that apply to other enhanced service providers. These channels are currently provided under tariff for Digital Data Service (DDS) in Pacific's CPUC Tariff No. B5. Additionally, Pacific notes, other enhanced service providers have the option of taking DDS channels from a Pacific Bell Access Tariff (CPUC 175T or Tariff FCC No. 128), under which relevant prices are in some cases lower than the inter-office DDS channels for which Pacific will charge itself.

26. To meet the requirement of condition two, the calculation of the NURE, Pacific will create a discrete rate element of five percent to reflect the cost of protocol conversion. This rate will be charged directly to the customer in the form of a percentage of the usage charges, and will be added to sent-paid-public-dial calls which access Pacific's packet switched network through an asynchronous port, and all other calls (i.e., direct or private dial or public dial with reverse billing) which require net protocol conversion. In establishing its NURE, Pacific states that it relied on protocol conversion inefficiency information provided by its equipment vendor, Northern Telecom. Attachment B to Pacific's filing explains the development process of Pacific's NURE. Pacific states that although its analysis and computations yielded a result of three percent, it chose to set its NURE at five percent to assure that there was no risk for under compensation for the network costs associated with protocol conversion.

27. Concerning condition three, pertaining to equal access, Pacific submits that it will provide end users with access to its and others' protocol conversion capabilities on an unbundled basis pursuant to its local exchange and Digital Data Service tariffs. Pacific also states that efficient, user friendly dial access to Pacific Bell or other vendors' packet switching facilities will be afforded through Pacific's Metro Data Dialing Service (MDDS), which provides distance insensitive usage charges, single seven digit number access from all points within the MDDS service area and concentration of data calls into 16 MDDS access hubs. Direct access to Pacific's PPS service will be provided by analog and digital private line facilities, for which prices, terms, and conditions are set by tariffs and are independent of the connected service or provider.

28. Pacific notes that the Commission expressed concern that DOV technology utilization must allow for equivalent access to both BOC and other enhanced service provider facilities. Initially, Pacific states, it will not offer such access to public packet switching; however, when such access is offered, it will be unbundled from public packet switching and offered under basic service tariffs to provide access to any vendor's packet switching service.

D. Marketing Criteria

29. The criteria associated with a marketing waiver are described in paragraph 10, above. On pp. 12-17 and Attachments D (Accounting Plan) and E (Sales Plan) of its filing, Pacific describes its compliance.

30. Pacific states that its Accounting Plan (see paras. 13-23, above) allows for identification and journalization of investment, revenues, and expenses associated with its regulated PPS network separate from those investments, revenues, and expenses associated with nonregulated protocol conversion. PPS costs will be divided between basic (regulated) and enhanced (nonregulated) service in proportion to traffic, and a traffic ratio will be used to identify the enhanced portion of total PPS capital costs, marketing expenses, maintenance and provisioning expenses, and operational taxes. The traffic ratio will be used to apportion all expenses between basic and enhanced services except expenses for billing and collection, which will be apportioned on a bill related basis. The PPS usage revenues for net protocol converted calls will be booked below-the-line, while revenues for basic usage and the NURE will be booked in above-the-line accounts. Costs attributable to enhanced service include a proportion of marketing and operational expense. NURE revenues will be booked above-the-line to compensate for enhanced service inefficiencies not reflected in the traffic-related allocation ratio.

31. Pacific explains that it will make customer proprietary information available to vendors through its Centralized Operations Group (COG), and that authority for the release of that information will rest with the customer. A customer's written request to preclude access of Pacific's marketing or sales personnel to the customer's proprietary information will be honored by Pacific. Pacific maintains that it does not possess customer proprietary information that would be useful in the marketing of protocol conversion. Since the customer's need for protocol conversion is dependent upon the access protocol of the customer data terminal equipment, and since Pacific does not supply or service CPE, Pacific asserts that it has no knowledge nor database record of customer access protocol, and therefore no particular marketing advantage from available records.

32. The third criterion for a protocol conversion joint marketing waiver requires the company to show that it can meet conditions two and three of the collocation waiver requirements. As discussed above, Pacific has shown how it intends to comply with these two conditions.

IV. SUMMARY OF PLEADINGS

33. Comments were filed by GTE Telenet Communications Corporation (Telenet), Tymnet, Inc. (Tymnet), North American Telecommunications Association (NATA), and RCA Communications Inc. (RCA). Pacific filed a reply. These are summarized below.

34. Telenet states that Pacific's compliance showing is incomplete in a number of critical respects, and in other respects the materials filed affirmatively demonstrate noncompliance with the relevant conditions. Initially, Telenet argues that Pacific has not met any of the collocation conditions of the *Protocol Waiver Order*. Telenet notes that Pacific has not filed sample tariffs containing the terms and conditions under which inter-office circuits will be ordered. Moreover, according to Telenet, Pacific's NURE analysis fails to identify which usage charges will

be subject to a surcharge and does not show that these usage charges are at a level which would fully recover the costs of the access concentrator/protocol conversion facilities in which inefficiencies would occur. Finally, Telenet asserts that Pacific has only stated its intention to amend its MDDS tariff to afford equal access; it has not actually amended that tariff. Thus, according to Telenet, Pacific has not met the requirements of condition three.

35. Telenet also states that Pacific's request for a marketing waiver should be denied for several reasons. First, Telenet argues that since Pacific's NURE surcharge will be placed in a tariff, it follows that the entire PPS tariff, both basic and enhanced, will be under tariff, which is a violation of the *Computer II* rules against tariffing enhanced services. Second. Telenet claims that Pacific's accounting plan is deficient because its lacks symmetry, i.e., the plan will overallocate investment and expenses and underallocate revenues to the enhanced portion of PPS, resulting in cross-subsidization of the service by the basic service ratepayers. Additionally, Telenet asserts, Pacific's accounting plan improperly uses revenues to allocate "common" and "general" advertising costs; it underreports time devoted to PPS; and it does not capture adequately billing and collection costs. Third, Telenet observes that Pacific's intent to treat asynchronous traffic which enters or leaves its network through an X.75 port as a basic rather than an enhanced service is improper, and adversely affects the cost and revenue allocation between basic and enhanced services. Finally, Telenet states that Pacific's proposal for the treatment of customer proprietary information is deficient because it does not provide other enhanced service providers with the same access to this information as that provided to Pacific's PPS marketing force.

36. Telenet concludes by observing that Pacific did not file a Federal tariff for PPS, nor did it file a Federal tariff which incorporated a state tariff. Failure to do so, Telenet argues, requires deferral of Pacific's Compliance Plan and its marketing waiver request.

37. Tymnet states that a number of serious questions must be fully explored and resolved before Pacific's Compliance Plan can be accepted. Initially, Tymnet asserts, Pacific's filing cannot be assessed because projected cost and revenue data for PPS service were not provided. Tymnet notes that presumably Pacific's rationale for not furnishing this information is based on the theory that PPS is jurisdictionally intrastate, and thus such data need not be submitted. Tymnet argues that to the contrary, Pacific's filing plainly contemplates that PPS will be used to access interstate offerings of other service providers. Accordingly, Tymnet states, the Bureau should direct Tyment to offer PPS pursuant to interstate access tariffs, and to furnish data to support its charges.

38. Tymnet also asserts that Pacific has not fulfilled the requirements of conditions two and three of the *Protocol Waiver Order*. Tyment argues that Pacific's NURE of five percent is unjustifiably low, especially in view of the fact that Pacific does not intend to impose additional charges to recover the costs of equipment used to perform protocol conversion or the marketing, installation and maintenance, and overhead costs associated with the service. With respect to condition three, Tymnet claims that Pacific has not offered interconnection that is "comparably efficient". Tymnet observes that Pacific has only stated its intent to offer equal access; it has not actually amended its tariff to do so. Moreover, Tymnet argues, Pacific has not adequately explained the cost differences between intra-office wire (short-wire) connections provided to Pacific and those same connections provided to other enhanced service vendors. Finally, Tymnet notes, Pacific should be directed by the Commission to obtain approval for any tariff for DOV service before that service is implemented.

39. Tyment states that Pacific's accounting plan is unacceptable and should be revised. Tymnet in essence asserts that because Pacific neglects to discuss and explain the theory underlying its accounting proposal, its entire Compliance Plan is confusing. According to Tymnet, Pacific's proposed allocation method creates a substantial cost-revenue imbalance, i.e., the costs associated with basic service will be relatively low, while the revenue attributed to that same service will be relatively high. This fundamental flaw, Tymnet asserts, distorts the true cost-revenue relationship between the basic and enhanced services.

40. Tymnet concludes that Pacific's request for a marketing waiver should be denied because Pacific has failed to demonstrate that any public benefit will be gained from eliminating the *Computer II* structural separation safeguards. In addition, Tymnet asserts, Pacific's accounting plan does not assure a fair allocation of total marketing cost to PPS because of the use of exception-time reporting. Tymnet also argues that Pacific's plan for the treatment of customer proprietary information is completely unacceptable. While Pacific has agreed to restrict access to basic service customer information by its marketing and sales personnel only if a customer specifically requests such treatment, it apparently will not automatically restrict access by its end-user sales force to customer records of Value Added Networks (VANs), interexchange carriers, and information service providers. Additionally, Tymnet states, Pacific has not specified whether, and how, it intends to provide unaffiliated vendors with access to basic service customer information if authorized by the customer to do so.

41. RCA's opposition is limited to Pacific's request for a marketing waiver. Essentially, RCA asserts that the grant of Pacific's marketing waiver request would partially moot some of the major issues in the *Third Computer Inquiry*, i. e., proposals to eliminate or relax structural separation requirements, plans for more stringent alternative safeguards, or the elimination of any joint marketing altogether. RCA urges that no action be taken on Pacific's joint marketing request until these issues are resolved in the *Third Computer Inquiry*.

42. NATA's comments are also directed to Pacific's request for a marketing waiver, and focus solely on the treatment of customer proprietary information. NATA states that Pacific's proposal to release customer information to its enhanced service sales personnel unless the customer requests otherwise in writing, and to withhold such information from its competitors unless the customer requests otherwise in writing, fails to satisfy the second marketing criterion of the *Protocol Waiver Order* that other enhanced service providers will have comparable access to customer information.

43. In its reply, Pacific first addresses the issues related to the collocation conditions of the *Protocol Waiver Order*. In response to Telenet's concern that Pacific did not file a sample tariff containing the terms and conditions under which inter-office circuits will be offered, Pacific filed, as Attachment A to its reply, a copy of CPUC Tariff

No. B 5. Pacific notes that while it will take inter-office circuits under this tariff, the VANs can select these facilities from a variety of tariffs, some of which may offer prices lower than those obtained under Tariff No. B 5.

44. In response to Telenet's concerns regarding the NURE and usage charges, Pacific explains that charges for the transport of protocol packets consist of a usage transport charge, and that the NURE surcharge is applied on top of that transport charge. The usage transport charge recovers operational costs as well as investment related cost associated with packet transport, while the NURE recovers additional investment and operational costs associated with the inefficiencies of processing protocol converted packets. In response to Tymnet's comments that the NURE is unjustifiably low because it does not cover certain costs, Pacific states that under its proposal, both the investment costs and operational costs associated the inefficiency of performing protocol conversion are recovered in its NURE. Additionally, the marketing, maintenance, billing and overhead costs are recovered by the usage charge to which the NURE is applied.

45. In reply to Telenet and Tymnet's comments on when MDDS will be placed in a separate tariff, Pacific states that it does not plan to make such a filing until it is able to offer protocol conversion services. Pacific also states, in response to Tymnet's comments concerning intra-office channels, that the costs of intra-office wiring are included in its existing Private Line tariffs and customers of both Pacific and competing providers will pay charges under that same tariff. Finally, in response to Tymnet's concern over DOV offerings, Pacific submits that it is not proposing DOV access to its protocol conversion facilities at this time and that any consideration of this issue is irrelevant to Pacific's Compliance Plan.

46. Turning to the parties comments on its accounting plan, Pacific states that Telenet's argument that Pacific's proposal lacks symmetry, and Tymnet's concern that the plan will result in a mismatch of costs and revenues, suggest a misunderstanding of Pacific's proposed procedures. Pacific explains that its accounting plan will book all non-carriage (nonrecurring installation charges and recurring monthly port charges) into regulated accounts. The only portion of PPS revenues and costs attributable to enhanced services are the usage charges, which will be allocated between regulated and nonregulated service based on the converted traffic ratio. This, Pacific contends, is a very symmetrical process that assures a match between revenues and costs for each aspect of the PPS service.

47. In reply to Telenet's comments that Pacific's plan improperly uses revenues to allocate common and general advertising costs, Pacific states that its willingness to identify direct PPS advertising costs as well as enhanced service portions of common and general company advertising, and to transfer these amounts to unregulated accounts is a very reasonable approach to ensure that the nonregulated service is not being subsidized. Pacific also states, in response to Telenet and Tymnet's comments on exception time reporting, that while there may be alternatives to this method, it was used by Pacific because it was found acceptable by the Bureau in the New Jersey Bell packet switching petition. Finally, in reply to Telenet's comments that Pacific's accounting plan does not adequately capture billing and collection costs, Pacific states that its approach is an appropriate methodology that will fully capture these costs.

48. In response to Telenet, Tymnet, and NATA's objections regarding the treatment of customer proprietary information, Pacific contends that the parties ignore the fact that the information is proprietary to the customer, that the customer expects the exchange company to use the information, and that the customer also expects the exchange company to protect the information unless the customer states otherwise. Also, Pacific notes, its approach is consistent with the procedures approved by the Commission in connection with removing structural separation requirements for AT&T with respect to customer premises equipment.

49. Pacific states, in reply to Telenet and Tymnet's comments that it should file Federal tariffs and related cost support data, that it is providing an intraLATA service only, under which its handling of traffic is between points in a single LATA, and that dial access into its PPS network will not be possible from outside the LATA. Pacific asserts that PPS service is distinguishable from exchange access, which is federally tariffed by Pacific, in that PPS will not directly connect with interexchange carriers' points of presence (POP) for transport to a different LATA. Pacific maintains that since a federal tariff is not required, related cost support data in likewise unnecessary. In response to Telenet's contention that Pacific proposes to provide protocol conversion under tariff, which is in violation of the *Computer II* rules, Pacific states that the tariffed NURE charge is consistent with the Commission's requirement that this charge be imposed. Furthermore, Pacific responds, where enhanced services offerings are so intertwined with basic offerings, and where the Commission has established a level of review such as in the current proceeding, it is virtually unavoidable to have some tariff involvement.

50. In response to Telenet's comments concerning Pacific's treatment of asynchronous traffic entering or leaving the network through an X.75 port, Pacific states that in its view the only method to provide internetwork traffic is via X.75, and that this protocol is, in effect, neutral.

51. Finally, in reply to RCA's comments that action be deferred on Pacific's proposal, Pacific states that this suggestion appears to be motivated more by a desire to delay than by other matters. Pacific states that the Commission has recognized the benefit to the public of offerings of protocol conversion services by the BOCs, and in light of that recognition, a waiver process was adopted. Pacific concludes that there is no basis to defer action on existing protocol conversion filings.

V. DISCUSSION

A. Accounting Plan

52. Both Tymnet and Telenet argue that Pacific's accounting plan lacks symmetry. The absence of symmetry allegedly results in a mismatch of costs and revenues, and an improper ratepayer cross-subsidy. Tymnet also contends that Pacific has not explained adequately the theory underlying its accounting proposal. Our analysis does not support these positions. We note that Pacific's theory is similar to that contained in the *Fifth Report and Order* in CC Docket No. 81-893, as Pacific explains in Attachment D to its filing. The detailed discussion in that same attachment is interwoven with the theory of the proposal, as well as the actual implementation procedures. We believe that Pacific has adequately explained its account-

ing plan, both from a theoretical and an actual standpoint. Our review also shows that Pacific's proposal properly accounts for the costs and revenues associated with its PPS, and that through its allocation procedures, Pacific will book these amounts to the appropriate services.

53. Telenet raises some specific points concerning Pacific's advertising expenses and billing and collection costs. We are satisfied, following our review, that Pacific will account for these expenses properly, and charge the appropriate amounts to the regulated and unregulated accounts. Both Telenet and Tymnet question Pacific's use of exception-time reporting for capturing marketing costs. Pacific has followed essentially the same exception-time reporting procedures as those used by other BOCs for capturing these expenses, and we are satisfied with the use of these procedures here. 54. We find that Pacific's accounting plan and cost allocation procedures are in accordance with our requirements, and conclude that they are adequate to segregate the investment, expenses, and revenues of protocol conversion from those of basic packet switching. We note, however, that both the accounting plan and allocation procedures must be considered as interim, pending the final outcome of the *Third Computer Inquiry* and the joint and common cost proceeding (Docket 86-111).[9]

B. Compliance with Collocation Conditions

1) Pricing of Inter-Office Channels

55. Our review of Attachment A to Pacific's filing, as well as of its Tariff B.5 filed as an attachment to its reply comments, satisfies us that the rates it will charge itself for inter-office channels are the same as those under which these facilities will be made available to others. Telenet asserts that Pacific did not meet condition one because it failed to file sample tariffs, but as indicated above, Pacific did so as Attachment A to its reply comments. Additionally, in response to a staff request, Pacific submitted cost support data underlying the tariffed inter-office channels.[10] Copies of this information were made available to all parties to this proceeding, but no comments were received. Our review of this cost support data confirms our conclusion that Pacific has met the requirements of condition one.

2) Network Utilization Rate Element (NURE)

56. Pacific describes the calculation of the NURE in Attachment B to its Compliance Plan. Additional information was also filed in response to a staff request.[11] Telenet argues that Pacific has not adequately identified or explained certain aspects of the NURE, and Tymnet claims that Pacific's NURE is too low. Our review of the material submitted by Pacific in its Compliance Plan, plus that filed in response to the staff's request, shows that Pacific has adequately identified the elements and explained the methology used to calculate its NURE. Additionally, we believe that Pacific has shown that the level of its NURE adequately recovers the inefficiencies related to protocol conversion. Thus, we are satisfied that Pacific has met the requirements of condition two.

3) Access to Data Over Voice (DOV)

57. Pacific states that it will provide end users with access to its and others' protocol conversion capabilities on an unbundled basis pursuant to its local exchange and DDS tariffs. It notes that that user friendly dial access will be afforded through its MDDS, and that direct access will be provided through private line facilities. Both Telenet and Tymnet argue that requirements of this condition have not been met because while Pacific has stated its intent to amend its MDDS tariff to offer equal access, it has not actually amended that tariff. We agree with the parties on this matter, and will require Pacific to amend its MDDS tariff prior to providing protocol conversion service, and to notify this Commission of this amendment.

58. Tymnet argues that Pacific has not adequately explained the cost differences between short-wire connections provided to Pacific and those same connections provided to other enhanced service providers. In response to the staff request noted above, additional cost support data was provided on this matter. Here again, no parties filed comments on this additional data. Our review of this material, however, satisfies us that this aspect of condition three has been met.

59. Finally, Tymnet argues that Pacific should be directed to obtain approval for any tariff for DOV service before that service is implemented. Pacific states that since it is not offering DOV service at this time, any consideration of this issue is irrelevant to Pacific's Compliance Plan. Since Pacific is not offering DOV access at this time, we will not rule on its compliance with this aspect of condition three. However, when Pacific offers DOV access it will be required to demonsrtate that it is in compliance with the requirements of this condition.[12]

C. Marketing Criteria

60. The first criterion for a grant of a protocol conversion joint marketing waiver is that the company demonstrate that it will identify and allocate to non-regulated operations the cost of marketing protocol conversion. In its proposed accounting plan, Pacific has described the procedures it will follow to separate marketing costs associated with protocol conversion from basic packet switching (see paras. 13-23, 30, above). Telenet's and Tymnet's concerns were addressed in the discussion of Pacific's accounting plan (para. 53, above), and we will not repeat that discussion here. For the reasons stated therein, we believe that Pacific's accounting plan is adequate to segregate the marketing costs for protocol conversion from the basic packet switching marketing costs. Thus, we conclude that Pacific has met the first marketing waiver requirement.

61. The second criterion requires that the company explain how it will make marketing information available to other enhanced service vendors to give them an opportunity comparable to that of the BOCs' unseparated marketing personnel to sell protocol conversion service to the BOC basic telephone service subscriber. The procedures Pacific proposes, as Pacific notes, are similar to those the Commission approved when it relieved AT&T of the separate subsidiary requirement for the provision of CPE.[13] More stringent requirements are not warranted in these circumstances.

62. The final criterion for a protocol conversion joint marketing waiver requires the company to show how the joint marketing proposal relates to conditions two and

three of the collocation requirements. Pacific has proposed a NURE of five percent and explained the methodology of calculating it. In addition, it has discussed how it plans to meet the requirements of condition three. Based on these proposals, and on the condition that it satisfy our concerns with respect to the collocation condition three, we conclude that Pacific has met the third criterion for a joint marketing waiver.

D. Other Matters

63. RCA is concerned that a grant of Pacific's request for a joint marketing waiver will moot important issues being considered in the *Third Computer Inquiry*. Inasmuch as the *Third Computer Inquiry Report and Order* has been released since RCA filed its comments in this proceeding, its concerns are unfounded.

64. Telenet argues that Pacific's tariffing of its NURE essentially is a violation of the *Computer II* rules against the tariffing of enhanced services. In the *Protocol Waiver Order*, at para. 124, the Commission specifically stated that the tariffed service of X.25/X.25 must include a separate network utilization rate element to be applied to any port operating on an asynchronous protocol. We are satisfied that Pacific is in compliance with the *Protocol Waiver Order*, and not in violation of the *Computer II* rules.

65. Telenet also claims that Pacific's intent to treat asynchronous traffic which enters or leaves an X.75 port as a basic service, rather than as an enhanced service, is improper, and adversely affects the cost and revenue allocation between basic and enhanced service. We agree with Telenet on this point. Absent an affirmative ruling by the Commission that asynchronous to X.75 is a basic service, we must consider it to be enhanced. As such, we direct Pacific to make the necessary adjustments in its cost allocation procedures to reflect this change, and to notify the Bureau of these adjustments within thirty days of the release of this order.

66. Finally, both Telenet and Tymnet argue that since Pacific did not file the appropriate tariffs, along with the underlying cost support data, its Compliance Plan and marketing waiver request cannot be accepted. We note in connection with revisions to its federal access tariff, Pacific did request, and was granted, a waiver of Section 61.74 of the Commission's rules, which permits it to reference its state tariffs in its federal filing, and which, in essence, relieves it from filing the accompanying cost support data.[14] Thus, Pacific is in conformance with the Commission's rules on this matter.

VI. CONCLUSIONS

67. We believe Pacific's accounting plan and cost allocation procedures adequately satisfy the requirements of the *Protocol Waiver Order* to separate the costs and revenues associated with protocol conversion from those of the basic packet switching service. We also believe that Pacific's Compliance Plan satisfies the three collocation conditions of that *Order*. Thus, subject to the conditions set forth herein, we accept Pacific's Compliance Plan.

68. Additionally, we conclude that Pacific has satisfied the three criteria for a joint marketing and billing waiver, and subject to the determinations reached herein, we grant Pacific's request for a joint marketing and billing waiver.

VII. ORDERING CLAUSE

69. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 154(j), that Pacific's Compliance Plan IS ACCEPTED and that its joint marketing and billing waiver request IS GRANTED, subject to the conditions set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[2] 47 C.F.R. Sec. 64.702; *see* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) 77 FCC 2d 384 *recon.* 84 FCC 2d 50 (1980), *further recon.* 88 FCC 2d 512 (1981), *aff' d sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F 2d 198 (D.C. Cir 1982), *cert. denied* 461 U.S. 983 (1983).

[3] The determinations reached herein do not apply to Pacific's request to provide asynchronous/X.25 protocol conversion in connection with its "Victoria" project. That matter is being considered in a separate proceeding (AAD-6-1463) which concerns a specific technology that is not part of Pacific's circuit-switched or packet-switched network.

[4] Section 64.702 (a) of the Commission's rules, 47 C.F.R. Section 64.702 (a) states:

> For the purpose of this subpart, the term "enhanced service" shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber inteaction with stored information. Enhanced services are not regulated under Title II of the Act.

[5] For proposed amendments to the above definition and for other proposals to change our treatment of the enhanced offerings of communications common carriers, see Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), FCC 86-252 (released June 16, 1986); Supplemental Notice of Proposed Rulemaking, FCC 86-253 (released June 16, 1986) (*Computer III Supplemental Notice*).

[6] Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II), FCC 84-561 (released November 28, 1984).

[7] *Protocol Waiver Order*, supra, at 1112.

[8] According to Pacific, the traffic related allocation factor is developed by having a PPS Data Collection Center (DCC) identify and report the percentage of transmitted packets which do and do not involve protocol conversion. From this data, Pacific will calculate the average of the net protocol conversion traffic percentages for the current month and the preceding five months. In the event there are less than five preceding months,

the average will be calculated for the current month and the number, if any, of preceding months which exist. Pacific will then use this factor to apportion and remove from its above-the-line accounts the costs associated with calls requiring net protocol conversion.

[9] *See* Separation of Costs of Regulated Telephone Service (CC Docket 86-111) FCC 86-146 (released April 17, 1986.)

[10] *See* letter from Michael Wilson, Chief, Audits Branch, dated April 23, 1986, to K.B. Yarnevic, Director, Federal Regulatory Relations, Pacific Bell. *Seeld.* The parties did not respond to Pacific's additional information in this regard.

[12] In ruling on a recent waiver, we discussed guidelines for providing DOV access. *See Memorandum Opinion and Order*, New York Telephone Company, Petition for Waiver of Section 64.702 of the Commission's Rules (Computer II), AAD 5-1242, Mimeo No. 6782 (released September 11, 1986).

[13] *See* Furnishing of Customer Premises Equipment and Enhanced Service by American Telephone and Telegraph Co., 102 FCC 2d 655 (1985), recon. denied, FCC 86-341 (released August 7, 1986). These procedures are also similar to those the Bureau approved for use by New Jersey Bell (*see Memorandum Opinion and Order*, ENF 84-22, Mimeo No. 1426, (released December 13, 1985)) and the other Bell Atlantic companies (*see Memorandum Opinion and Order*, AAD-5-1269, Mimeo No. 4452, (released May 19, 1986)).

[14] *See* letter from Gary W. McBee, Vice President, Washington Operations, Pacific Bell, to Secretary, FCC, dated February 6, 1986; letter from John Cimko, Jr., Chief, Tariff Division, Common Carrier Bureau to Gary W. McBee, Pacific Bell, dated June 25, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SATELLITE COMPANY File No. CSG-87-001-P/L

Application for authority to construct and operate a 6/4 GHz international earth station at College Park, Georgia for provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: November 24, 1986 Released December 3, 1986

By the Common Carrier Bureau:

1. The Commission has under consideration an application filed on October 7, 1986, by American Satellite Company (Amsat), requesting authority pursuant to Title III of the Communications Act of 1934 and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, to construct and operate international earth station facilities at College Park, Georgia for provision of INTELSAT Business Services (IBS). The application was placed on public notice on October 15, 1986. No comments were received. The applicant has been granted blanket authority to establish and operate channels of communication between the U.S. and various overseas points for provision of IBS.[1]

2. The proposed earth station will consist of a 7.2 meter antenna connecting with INTELSAT V satellites in the 6/4 GHz band. The earth station will be constructed on customer premises near College Park, Georgia and will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the U.S. as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. Amsat's technical, legal and financial qualifications to construct and operate the proposed earth station are established. Amsat has been authorized to construct and operate other IBS earth stations.[5] The proposed earth station complies with INTELSAT performance criteria for IBS stations. Amsat has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of the requested services and facilities is in the public interest.

7. Accordingly, IT IS ORDERED pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, and Section 201(c) of the Communications Satellite Act of 1962, that applications File No. CSG-87-001-P/L IS GRANTED, and Amsat is authorized to construct and operate the proposed earth station at College Park, Georgia to provide IBS and related digital video services.[6] Before completion of the equipment installation and facility activation, however, the applicant should provide the Commission with a summary of actually installed equipment.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] See AT&T *et al.*, (File No. I-T-C-85-035 *et al*), Mimeo No. 3220 (released March 18, 1985).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the facilities authorized for provision of

IBS or television services to these services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] See the cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327, (released March 25, 1986).

[5] See American Satellite Company (File No. CSG-85-010-P/L), Mimeo No. 5236 (released June 20, 1985); American Satellite Company (File No. CSG-85-054-P/L), Mimeo No. 394 (released October 4, 1985).

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

KRISAR, INC. File No. 66919-CM-P-83

For a construction permit to establish a Multichannel Multipoint Distribution Service) facility on the F-channel group frequencies for the Cleveland, Ohio MSA.

MEMORANDUM OPINION AND ORDER

Adopted November 26, 1986 Released December 3, 1986

By the Chief, Common Carrier Bureau:

1. Before the Bureau is the application of Krisar, Inc. ("Krisar" or "Applicant") for a construction permit to establish a Multichannel Multipoint Distribution Service (MMDS) facility at Cleveland, Ohio. Krisar's application for the Cleveland F-channel group frequencies was tentatively selected for qualification review in the MMDS lottery conducted by the Commission on September 27, 1985. A Petition to Deny Krisar's application has been filed by North Coast Cable, Ltd. ("NCC"or"Petitioner"). Metropolitan Cablevision also filed a Petition to Deny, but subsequently voluntarily withdrew its Petition by letter dated October 30, 1986.[1] Krisar has filed a consolidated reply, a supplement to that reply, and related amendments. As a general matter, NCC alleges that substantial and material questions of fact concerning the qualifications of the Applicant have been raised sufficient to warrant the denial of its request for an MMDS authorization. We have considered the arguments presented by all parties to this proceeding and find that the petitions have not raised substantial and material questions of fact that warrant further inquiry.

I. BACKGROUND

2. In order to discourage the filing of multiple applications by applicants seeking to increase their chances of selection in the MMDS lottery in a particular area, the Commission required that each applicant submit only *one* application for either the E-channel group or the F-channel group frequencies, but not both. This requirement is reflected in Section 21.901(d)(2), the "one-to-a-market" rule. 47 C.F.R. § 21.901(d)(2). The purpose of the "one-to-a-market" rule is to discourage the practice known as "stuffing the ballot box". In adopting the rule, we stated our intent to scrutinize an applicant's compliance with our one-to-a-market rule and real party-in-interest disclosure statement contained in the response to Item 25(b) of FCC Form 435 (the construction permit application form). Together, these two rule sections assist us in identifying applicants who have filed multiple applications in contravention of our rules.[2]

3. According to its FCC Form 430 ("Common Carrier Licensee Qualification Report"), the President and sole shareholder of Krisar, Inc. is George Bott. Bott is also the Vice-President of a New York real estate investment firm, hereinafter referred to as the "Galesi Group". The Galesi Group is chaired by Francesco Galesi. By affidavit, Galesi states that in the spring of 1983, Angela Shaw, President of Applied Communications Technology (ACT) and also a business colleague of Galesi's, approached Galesi to discuss the potential business opportunities available through multi-channel MDS. As a result of these discussions, ACT was retained by Galesi in July, 1983 to assist in the preparation for filing of approximately 150 MMDS applications, on behalf of Galesi. ACT's services were apparently of a technical nature, including the securing of transmitter site locations for Galesi's proposed MMDS facilities. However, two weeks prior to filing these applications, Galesi purportedly was advised by counsel that due to his assent to a non-competition agreement arising from a separate business venture, he would be precluded from entering the MMDS field. This restriction would remain in effect until April, 1987. Rather than lose his investment in the MMDS applications, Galesi "consulted with and ultimately assigned in late August, 1983 all [his] interest in the [150] substantially completed [MMDS] applications to George W. Bott", described as a friend and business associate. (Affidavit of Galesi, dated January 20, 1986). Galesi states that he did so without anticipation of any reimbursement for expenses incurred by him in the preparation of the applications prior to their assignment to Bott. In addition, due to the brief time period remaining in which to complete the applications for filing, Galesi also extended his financial resources to Bott for the construction and operation of the proposed facilities. Aside from Galesi's financial assistance to cover construction and operating expenses, Galesi asserts that he would have no involvement in the preparation of the applications subsequent to their assignment to Bott. Bott, alone, would be responsible for the prosecution of the applications and any expenses incurred after the transfer of the applications. Galesi states that his actions in transferring the applications to Bott, were motivated by the legal restriction on his ability to enter the MMDS field at that time, his confidence in Bott's business acumen and "past efforts which have resulted in [Galesi's] personal financial gain". *Id.* Although the MMDS applications were purportedly substantially complete for filing at the time of transfer, additional preparation was allegedly required to ready them for filing. Toward that end, Bott engaged the services of ACT, in late August 1983, to assist in the completion of the applications. In return for services rendered by ACT, Krisar agreed to pay ACT $10,000 plus expenses and disbursements (up to $12,500). In addition, "in consideration of said services, Krisar [would] extend to ACT the option to purchase up [to] 10% of its voting equity at a price of $100. Such option must be exercised within 30 days of the final grant by the FCC to Krisar of its first MMDS license." (Letter from Angela Shaw to George Bott, dated September 8, 1983).

4. Krisar has been chosen as the lottery winner in nine of twelve lotteries held to date.[3]

II. ISSUES

5. The principal issues presented by NCC include the following:

(1) Is there a substantial and material question of fact regarding the real party (parties)-in-interest to Krisar's Cleveland MMDS application?

(2) Is Krisar's financial showing deficient in any material

respect?
(3) Has there been a violation of Section 21.901(d)(2), the "one-to-a-market" rule?
(4) Is Krisar's transmitter site availability showing deficient in any material respect?

A. Real Party-in-Interest

6. Petitioner contends that Bott's reliance on Galesi as his sole source of financing for the initial construction and operating expenses for Krisar's proposed facilities and their business ties to each other raises the inference that Galesi may be the real party-in-interest to Krisar's applications. For the reasons discussed below, we do not find that the evidence supports this conclusion.

7. Section 21.13(a) of the Commission's rules, 47 C.F.R. § 21.13(a), provides that an applicant must fully disclose the real party (or parties)-in-interest to the application, including a complete disclosure of the identity and relationship of those persons directly or indirectly owning and/or controlling the applicant.[4] The test for determining whether a third party is an undisclosed party-in-interest is whether the third party has an ownership interest in the application or will be in a position to actually or potentially control the operation of the facility. *Mobile Phone of Texas, Inc.*, 52 Rad. Reg. 2d (P&F) 1455(1982), *citing KOWL, Inc.*, 49 FCC 2d 962(1974).[5] NCC does not allege that Galesi has a direct ownership interest in Krisar or that he has the right to any corporate participation in the management or operation of the company. Krisar's ownership records reflect that only Bott has any legal interest in the company. Yet, Petitioner takes the position that because of Galesi's considerable financial commitment to Krisar and his business ties to Bott, Galesi is in a position to potentially control the operation and management of Krisar. We do not agree with this conclusion.

8. First, we cannot infer that Galesi is a party-in-interest to Krisar's applications merely from the overlapping business interests of Bott and Galesi. A party seeking to raise a party-in-interest issue involving close personal or business relationships has a heavy *prima facie* burden. The mere existence of personal and business ties does not create a *per se* presumption of control for purposes of our party-in-interest rules.[6] Second, although courts have recognized that one of the most effective ways to control any business operation is through the control of its finances (*see Heitmeyer v. FCC*, 95 F.2d 91 (D.C. Cir. 1937), we have also found that an applicant's reliance upon a close personal friend or business associate to provide the primary source of financing for its proposed facility does not necessarily cause the lender to become a party-in-interest to the application. *See Michael S. Rice*, 9 FCC 2d 217 (1967); *Voice of Middlebury*, 8 Rad. Reg. 2d (P&F) 109 (1966); *Medford Broadcasters, Inc.*, 15 Rad. Reg. 2d (P&F) 780 (1969); *Patterson Communications*, 41 Rad. Reg. 2d (P&F) 671 (1977).

9. Bott's reliance on Galesi to provide the financing necessary to cover the estimated costs of construction and operation of Krisar's MMDS projects does not necessarily render Galesi a party-in-interest to the applications. Likewise, the extension of a loan by Galesi to Bott on favorable terms and conditions does not, in and of itself, render the lender, Galesi, a party-in-interest to Krisar's applications. *See Warwick Broadcasting Corp.*, 15 Rad. Reg. 2d (P&F) 973 (1969).

10. According to Bott and Galesi, they have established nothing more than a debtor/creditor relationship. Galesi intends to extend a loan to Bott in an amount sufficient to cover the estimated costs of construction and operation of Krisar's MMDS projects. The parties state that a written agreement detailing their financial arrangement was not necessary because their oral promise is based on mutual trust. Both parties also attest that the financial arrangement gives Galesi no interest ownership in the applications or right to control the proposed facilities. According to Galesi, "since assigning [my] interest to Bott, [I have] not borne any expenses incurred by Krisar, nor have I been involved in any way, in the application process . . ." Furthermore, "I expect none of the profits which may be realized from Krisar's MMDS operations to inure to the benefit of either Galesi Group or myself". Affidavit of Galesi, dated January 20, 1986.[7]

11. Petitioners have not presented any evidence that the Galesi-Bott relationship is more than a debtor/creditor relationship based on friendship, trust, and prior business dealings. However, the Applicant must provide us with sufficient written details regarding the material terms and conditions of the intended loan arrangement. To proceed in this manner is consistent with the financial requirements of our rules discussed in more detail below.

B. Financial Qualifications

12. Section 21.17 of our rules, 47 C.F.R. § 21.17, requires each applicant to demonstrate its financial ability to meet the realistic and prudent estimated costs of construction and operating expenses for a reasonable period of time, generally construed as one year, for facilities for which it seeks authorization.[8] Krisar estimates the cost of construction of its proposed Cleveland facility to be $172,000. The question to be considered is whether Krisar has demonstrated its financial ability to meet the estimated costs of construction and operation associated with the Cleveland proposal as required by our rules.[9]

13. It is well established that applicants must provide "reasonable assurance" that sufficient funds are available to meet their estimated cost of construction and operation. *See Multi - State Comm. v. FCC*, 590 F.2d 1117, 1119-20 (D.C. Cir. 1978), *cert. deied sub. nom RKO General, Inc. v. Multi - State Comm., Inc.*, 440 U.S. 959 (1979). In order to demonstrate financial fitness, applicants may rely upon alternative sources of financing. *See, e. g. Voice of Middlebury, supra, D. H. Overmyer*, 8 Rad. Reg. 2d (P&F) 96 (1966), *Warwick Broadcasting Corp., supra*. Krisar has stated its intent to rely upon a loan commitment from Galesi to "fund the full cost of construction and working capital requirements for the stations for which authorization is requested". (Exhibit U of Krisar's FCC Form 435).[10] Galesi has affirmed "his present" intent to extend the necessary financing for Krisar's MMDS projects. To demonstrate its financial fitness, Krisar submitted a verified copy of Galesi's financial statement which shows that, as of August 31, 1983, Galesi had total liabilities of $9,430,000, total assets of $225,350,000 (including liquid and non-liquid assets), and a net worth of $214,920,000. While NCC does not dispute Galesi's net worth, it does raise a question as to the value of certain assets, particularly the real estate holdings and securities. Even though the balance sheet provides an estimate of the market value of Galesi's investment securities, it fails to identify which securities, if any, are publicly-traded. This fact is of significance because, generally, only publicly-

traded securities may be used to ascertain an applicant's current assets. If we discount the personal effects, real estate holdings and securities in determining Galesi's liquid assets, $1,050,000 in cash remains as current asset. We also note that the balance sheet does not segregate Galesi's current liabilities from total liabilities of $9,430,000. Notwithstanding these omissions, we find that in view of the fact that Galesi's ownership of nonliquid assets is several times the anticipated costs of construction and expenses of operation, we cannot seriously question his ability to provide the required funds. *See Cornwall Broadcasting Corp.*, 51 Rad. Reg (P&F) 389(1982), *citing International Broadcasting Co.*, 3 FCC 2d 449 (1966); *accord*, *Enterprise Broadcasting, Inc.*, 56 FCC 2d 352 (Rev. Bd. 1975).

14. Related to the question of whether Krisar has demonstrated reasonable assurance that funds will be extended by Galesi to finance its projects is the lack of specificity of terms and conditions of the intended loan arrangement. Galesi states that he will extend the required funds to Bott "at an interest rate and at terms of repayment that will be financially acceptable to Krisar, Inc. based upon circumstances existing at the time the loan is made." (Galesi Affidavit, dated January 20, 1986). Galesi further states that he has "never contemplated that collateral for the loan would be required." *Id.* The question then becomes whether the lack of detail as to loan terms and conditions is fatal to the validity of the loan commitment. As a general matter, the omission of "customary" terms and conditions, such as prevailing interest rates at the time the loan is to be made, is not dispositive of whether a lender has a present intent to extend financing to an applicant. However, we are not precluded from requiring such details regarding the nature of a loan arrangement, particularly where the *bona fides* of the lender has been questioned and the entire financing arrangement is predicated upon the financial resources of the individual lender. Consequently, in order to ensure that the financial arrangement between Galesi and Krisar is an arms-length transaction, we believe it appropriate to impose the same requirements upon Krisar that are typically required of all applicants who rely upon credit from a third party. Those details include a description of the terms and conditions of a loan, including the length of the term of the loan, terms of repayment, the interest rate, commitment fees, guarantees, and any applicable collateral or security provisions. *See also* Section 21.17(e)(1). Therefore, in order for Krisar to reasonably assure us of its financial ability, it must provide a description of the amount to be loaned by Galesi, the anticipated rate of interest, terms of repayment, default and security provisions. If no security will be required as has been suggested by Galesi, this fact should be so stated in the same document. Before beginning construction, Krisar must complete the technical and engineering details of its proposal, including an analysis demonstrating that the proposed facility will not cause harmful interference to existing cochannel or adjacent channel Instructional Television Fixed Service receiver locations within 50 miles of the proposed transmitter. *See* Section 21.902(i). Six months should provide adequate time to do this. We, therefore, shall require that all information concerning the loan be submitted within 6 months of the release date of this Order.

C. One-to-a-Market Rule

15. Section 21.901(d)(2), also known as the "one-to-a-market" rule, provides that an applicant may submit a single application for either the E-channel group frequencies or the F-channel group frequencies, but not both. The rule further states that the

> partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant . . . shall not have a cognizable interest in the application for . . . the same group, or other group of channels in the same area.

47 C.F.R. § 21.901(d)(2).[11]

16. NCC maintains that Krisar has violated the " one-to-a-market" rule based on the existence of the stock option agreement between Krisar and ACT and a contract performance agreement between ACT and Belwin, Inc. ("Belwin"), also an MMDS applicant in the Cleveland market.[12]

17. As previously described, Krisar had an agreement with ACT for payment of services rendered which provided that: (1) Krisar would pay ACT $10,000 plus expenses and disbursements, up to $12,500; and, (2) Krisar would extend to ACT an option to purchase up to 10% of its voting equity for $100 for each license granted to Krisar. The estimated fair market value of ACT's services has not been provided.[13]

18. It is clear that the stock option agreement between ACT and Krisar gives ACT an interest in Krisar. However, in order to violate our "one-to-a-market" rule, an entity must hold the same or a similar cognizable interest in another application in the same market. NCC asserts that ACT's interest in Belwin, Inc. is similar to its interest in Krisar. We do not agree. ACT has stated that the fair market value of its services to Belwin is $150,000. The agreement between ACT and Belwin provides that in return for services performed by ACT, Belwin agreed to: (1) pay ACT $10,000 plus expenses and disbursements; and, (2) pay ACT $20,000 for each construction permit issued to Belwin, up to a maximum of $140,000. (*See* letter to Wayne Wagner, President, Belwin, Inc. from Angela Shaw, President of ACT, signed by Wagner and Shaw, dated September 8, 1983). In our view, this arrangement constitutes a performance contract for services rendered and does not afford ACT any ownership interest, potential for control, or participation in the operation or management of Belwin. Thus, ACT has no interest in Belwin for Section 21.901(d)(2) purposes. ACT does, however, hold an interest in Krisar by virtue of the stock option arrangement, but does not hold an impermissible interest in any other application in the Cleveland market which would violate § 21.901(d)(2).[14] Therefore, from the evidence presented, we cannot conclude that there has been a violation of our "one-to-a-market" rule.

D. Site Availability

19. NCC raises questions regarding the physical characteristics of Krisar's proposed site location and the adequacy of the documentation submitted by Krisar to demonstrate the availability of its proposed transmitter site.

20. The application shows that ACT obtained transmitter site locations for Krisar's proposals. As NCC correctly points out, there was a discrepancy between the longitudi-

nal coordinates listed by Krisar in its original application (8 *0* degrees 44' 29" longitude) and those provided in its October 15, 1985 amendment (8 *1* degrees 44' 29" longitude). However, Krisar does provide an explanation for the variance in coordinates. It explains that due to a typographical error, one digit of the coordinates was incorrectly transcribed in both its original application and supporting documentation. Krisar's justification for the inaccuracy appears to be reasonable, especially since the incorrect coordinates reference a site 52 miles to the east of Cleveland. From this location Krisar's proposed facilities could not have feasibly transmitted to the Cleveland area. In addition, the January 15, 1986 affidavit of Kim E. Colebrook, President of GCC Communications of Cleveland, Inc., WERE-AM/WGCL-FM, the owner of Krisar's proposed site, confirms that the correct longitudinal coordinates for that location are (81 degrees 44' 29" longitude). Krisar also advises that no change in its original engineering proposal is necessitated by the correction of its site coordinates. The October 15, 1983 amendment filed by Krisar was submitted as a "matter-of-right" pursuant to Section 21.23(a).[15] In view of Krisar's explanation for the one digit coordinate discrepancy, we shall treat the October 15 site amendment as excepted from the cut-off provisions of § 21.31.

21. As evidence of the availability of its proposed site, Krisar initially relied upon an unsigned affidavit from John Hovanec, Chief Engineer of the station in September 1983. NCC argues that an unsigned statement of Hovanec cannot be considered as an affidavit. We need not decide this issue, because, in lieu of the Hovanec letter, Krisar has submitted a statement from the current President of the station, Kim Colebrook which confirms the oral agreement between Krisar and a station representative reached in August 1983 regarding the availability of space on a tower owned by WERE-AM. Moreover, Colebrook states that he has communicated with Bott and expressed an "interest in entering into a lease agreement with Krisar." The letter further provides that negotiations for a formal lease agreement will commence upon issuance of a construction permit to the Applicant. (Letter from Kim Colebrook, dated January 15, 1986 contained in February 7, 1986 supplement to Consolidated Reply filed by Krisar).

E. Other Matters

22. *Execution*. NCC maintains that because two supporting exhibits contained in Krisar's application were dated after September 1, 1983, the date on which Bott executed the applications, Bott's execution should therefore be considered improper. We do not agree. The first document referred to by NCC is an affidavit, dated September 9, 1983 of Angela Shaw describing the efforts undertaken by ACT to obtain suitable sites on behalf of Krisar. The mere fact that this affidavit is dated after Bott executed the application does not demonstrate that Bott did not have personal knowledge of the services performed by ACT at the time he executed the applications. Indeed, Bott's personal knowledge of ACT's efforts to secure a site on behalf of Krisar as of the date of his execution is apparent from a September 1, 1983 letter to Hovanec that was included as part of Krisar's original application which discusses the availability of the proposed site location. Likewise, a September 8, 1983 letter from Shaw to Bott describing the option agreement between the two parties, by its terms, memorializes the intent of the parties to be bound by their oral agreement reached prior to the date of Bott's execution of the applications. The letter reads, "Upon our Mutual signing of this letter, we evidence our agreement in regard to certain consulting services performed on behalf of Krisar, Inc. (Krisar) by Applied Communications Technologies, Inc. (ACT) . . . ." Consequently, we find that NCC's contentions in this regard are without merit.

23. *Technical Showing*. In addition, we find that NCC's allegations regarding the insufficiency of Krisar's technical showing required by Section 21.901(d)(7) to be without merit. In our view, Krisar's description of the efforts it would undertake to resolve cochannel and adjacent channel interference adequately complied with the Commission's expectation that applicants would vigorously work to resolve such interference conflicts. In its Exhibit H, Krisar stated not only its intent to cooperate with co-channel and adjacent channel operators to alleviate interference, but also indicated that it would employ engineering techniques such as the use of directional antennas, changes in antenna power, antenna height and radiation patterns, and site locations in order to resolve interference conflicts that might arise. Thus, NCC's reliance on *Advancom, Inc.*, FCC 85-560, released October 23, 1985, is misplaced.

24. *Additional Deficiencies*. Lastly, NCC lists five additional deficiencies that it contends render Krisar's application unacceptable for filing and subject to dismissal in accordance with Section 21.20(a)(1) of our rules. *See NCC Petition*, at 9. As to these items, we find that the deficiencies identified have either been cured by Krisar's October 15, and November 22, 1985 amendments or have been considered in the course of this proceeding, and are not found to be fatal to the continued processing of Krisar's application.

III. CONCLUSION

25. Based on the foregoing, we find that there are insufficient substantial material questions of fact to warrant the dismissal of Krisar's application.

26. Accordingly, IT IS ORDERED that the Petition to Deny the MMDS Application of Krisar, Inc. filed by North Coast Cable, Ltd. IS DENIED.

27. IT IS FURTHER ORDERED that the Petition to Deny filed by Metropolitan Cablevision IS DISMISSED.

28. IT IS FURTHER ORDERED that Krisar's October 15 and November 22, 1985 amendments ARE ACCEPTED.

29. IT IS FURTHER ORDERED that Krisar shall, within 6 months of the release of this Order, submit a copy of its loan agreement, including the terms and conditions of its loan.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] North Coast Cable Ltd. is the cable franchisee in Cleveland and allegedly would compete with Krisar in the distribution of entertainment television programming to Cleveland area residents. Likewise, Metropolitan Cablevision is a provider of programming services for microwave distribution in Cleveland.

[2] Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service (Second Report and Order), 50 Fed. Reg. 5983 (February 13, 1985).

[3] Krisar's application was tentatively selected for qualification review in the following nine markets: Cleveland, Ohio; Eugene, Oregon; Lubbock, Texas; South Bend, Indiana; Macon/Warner Robbins, Georgia, Binghamton, New York; Benton Harbor, Michigan; Killeen-Temple, Texas; Muskegen, Michigan. In each instance, Krisar has filed for only the F-channel group frequencies.

[4] To elicit information regarding the identity of the party(ies)-in-interest to an application, Item 25(b), FCC Form 435 inquires: "Are there any agreements or understandings existent or under negotiation which affect the ownership or control of the facilities proposed herein, or any interest therein by any person not party to this application?".

[5] *See also* Creek County Broadcasting Co., 31 F.C.C. 2d 462 (1971); and Sumiton Broadcasting Co., 15 FCC 2d 400 (1969).

[6] KOWL, Inc., 49 F.C.C. 2d 962 (1974).

[7] FCC Form 435 instructs all applicants who affirmatively respond to Question 25(b) to provide an explanation for their response (Exhibit Q) as part of their orginal application. While Krisar failed to provide the required Exhibit Q and has not proffered any explanation for the omission, it did, in a subsequent amendment dated October 15, 1985, disclose the nature of its agreement with ACT which is discussed further at Section C of this Order.

[8] *Public Notice*, Report No. 916, "Financial Showings Required of Applicants for Authorizations in the Multipoint Distribution Service" released June 26, 1978.

[9] We observe that the Applicant does not provide us with an estimate of operating expenses, and our ability to estimate this sum is hampered because the exact loan amount to be extended by Galesi has not been revealed.

[10] By affidavit, Bott indicates his intent to seek a loan from a bank or other financial institution, if necessary. Notwithstanding this assertion, we can only rely upon the evidence of financial ability before us at this time which is the loan from Galesi. In order for us to consider additional financial resources, Bott must request that he be permitted to make an amendment to the financial information contained in the applications. *See Section 21.23 of our rules, 47 C.F.R. § 21.23.*

[11] As a remedy for a violation of Section 21.901(d)(2), we have stated that we would consider the dismissal, with prejudice, of the violating applicationSee MMDS Lottery Order, 50 Fed. Reg. 5983, 5987.

[12] Belwin filed an application in the Cleveland market for the E-channel group frequencies. It also appears that in each of the markets in which Krisar filed for the F-channel group frequencies, Belwin filed for the E-channel group frequencies. Of the lotteries held in which both applicants participated, Krisar has been the successful lottery winner in nine markets and Belwin has been the chosen as the lottery winner in six markets.

[13] Along with the amendments submitted by Krisar on October 15, 1985, was an Exhibit Q revealing its agreement with ACT. The Exhibit will, therefore, be treated as a properly submitted timely "amendment-as-a-matter-of-right" pursuant to §21.23(a) of our rules. *See also* Bott Affidavit, dated December 5, 1985. Belwin answered in the affirmative to Item No. 25(b) in its applications. A copy of the agreement between ACT and Belwin dated September 8, 1983 has been considered as part of this proceeding. (Letter from Angela Shaw to Wayne Wagner, President of Belwin).

[14] In the MMDS Lottery Report and Order, 50 Fed. Reg. 5983, 5987, we recognized that parties may have a "commonality of interest" with respect to applications filed in a particular market without necessarily having a cognizable relationship to one another. In this case, Belwin's and Krisar's use of the same consulting service represents, at most, a commonality of interest between the two applicants. However, ACT's interest in Belwin and Krisar in no way increased either applicant's odds of being selected as the lottery winner which is the underlying purpose of the "one-to-a-market" rule. No evidence has been presented to link Galesi and Bott to Belwin.

[15] Section 21.31(e)(5) provides that a change in the coordinates of a station's transmitting antenna of more than ten (10) seconds latitude or longitude or both will not subject the application to our "cut-off" rules if the amendment corrects a typographical, transcription or similar clerical errors which are clearly demonstrated to be mistaken by reference to other parts of the application. . .". 47 C.F.R. § 21.31(e)(5).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

HERITAGE
BROADCASTING
COMPANY File No. 5501-CM-P-83
OF NORTH CAROLINA

For a construction permit to build a
Multichannel Multipoint Distribution
Service facility on Channel Group F
at Denver, Colorado

MEMORANDUM OPINION AND ORDER

Adopted November 26, 1986 Released December 3, 1986

By the Common Carrier Bureau:

1. The Common Carrier Bureau has before it for consideration: (1) the above-captioned application of Heritage Broadcasting Company of North Carolina ("Heritage") for authority to construct and operate a Multichannel Multipoint Distribution Service facility on Channel Group F at Denver, Colorado; (2) a petition to deny filed by United Cable Television of Colorado, Inc., United Cable Television of Jeffco, Inc., Mountain States Video, Inc., and Mountain States Video Communications Co., Inc. (collectively "United"); (3) a petition to deny filed by Denver Area Educational Television Consortium, Inc. ("DAETC"); and (4) related pleadings and amendments.

BACKGROUND

2. The Commission, in 1983, reallocated two groups of frequencies (Group E and Group F) from the Instructional Television Fixed Service ("ITFS") to the Multipoint Distribution Service thereby creating the Multichannel Multipoint Distribution Service ("MMDS").[1] Each of the reallocated frequency groups is composed of 4 channels each containing 6 MHz of bandwidth suitable for wide band video transmission.[2] The Commission decided to employ lotteries, to grant MMDS construction permits when more than one applicant had applied for one of the reallocated frequency groups in the same area. The Commission also modified its standard procedures to provide for the filing of post-lottery petitions to deny, only against the tentative selectee of the lottery.[3]

3. As a result of a lottery held on September 27, 1985, Heritage was selected as the tentative permittee to construct a new MMDS facility to operate on Channels F1, F2, F3 and F4 at Denver, Colorado. Heritage's qualifications thereafter were challenged in petitions to deny filed by United and DAETC.

PLEADINGS

4. United's sole allegation is that Heritage has failed to demonstrate its financial qualifications to be a MMDS licensee. DAETC's allegations, broadly stated, are that Heritage's application must be denied because it does not have a site for its transmitter antenna, and even if it did the station would be electrically incompatible with prior authorized facilities in the Denver area. Heritage has filed a consolidated response to both petitions. In addition Heritage has tendered amendments to its application providing, *inter alia*, a revised financial showing and specifying a new transmission site. DAETC also objects to Heritage's attempt to amend its application. For the reasons set forth below, we find that neither petitioner has raised a substantial and material question of fact that calls for further administrative consideration. Therefore, both petitions will be denied and DAETC's objections to Heritage's amendments are overruled.

United

5. *Financial Showing* : United alleges that Heritage has failed to establish its financial qualifications because it did not file a balance sheet with its application, and the "commitment" letter upon which Heritage relies to demonstrate its financial fitness merely states that the National Bank of Detroit is willing to consider a loan of up to $250,000 per market to finance the construction of MMDS stations in 16 markets for which Heritage has filed applications. No mention whatsoever, says United, was made of interest rates, payment arrangements, collateral and terms of default. In view of these absences, United says, Heritage has not shown that it has the requisite financial resources to construct and operate a new MMDS station. United contends further that Heritage is barred by Section 21.31(e) of the Commission's Rules from curing these defects.

6. In response, Heritage contends that its original commitment letter was adequate since it was similar to bank letters previously determined by the Commission to have met its "minimum filing requirements". Even if it were determined to be inadequate, Heritage has submitted a second letter that, it says, vitiates all of United's concerns regarding Heritage's financial qualifications.[4] Now the National Bank of Detroit has committed to lend Heritage $350,000, which, Heritage says, will more than cover all construction and initial operations costs of the MMDS facility.

Discussion

7. A MMDS applicant is required by the Commission's Rules to provide, in its application, a demonstration of its financial resources to construct and operate for a reasonable time the facilities for which it is seeking an authorization. If the applicant relies, wholly or in part, on a bank loan to satisfy this obligation then its demonstration must include a letter of commitment, which states that the funds are available to the applicant. The letter must also set out the terms of the loan. 47 C.F.R. § 21.17. United has not pointed to any rule that classifies the filing as major, subjecting the application to the cut-off rules. *See* 47 C.F.R. §§ 21.23(c)(2) and 21.31. The issue is whether Heritage, with its revised commitment letter, has established that it is financially qualified to build and operate the Denver MMDS station.

8. We find that Heritage has presented sufficient evidence of financial qualification in its application to meet the Commission's MMDS requirements. The National Bank of Detroit will provide Heritage with $350,000 to meet its construction and operation costs. Heritage estimates that it will need approximately $216,000 to establish its proposed facilities. Consequently, it will have the remaining $124,000 to satisfy its initial operating expenses. The bank's commitment is unequivocal and the details of the loan are clearly stated. The loan will be repaid over three years, commencing 30 days following the completion of construction, at an interest rate of 1 - 1/2% above National Bank of Detroit's prime rate.

Daetc

9. *Site availability* : Daetc accuses Heritage of misrepresenting that an antenna site would be available to it. DAETC asserts that contrary to the attestations made by Heritage in its application, it did not secure assurances that it would be able to mount its antenna on the tower belonging to Denver television station KMGH-TV.

10. DAETC supports this allegation with an affidavit of Larry Pozzi, the Chief Engineer of KMGH-TV, who refutes the claims made by Heritage that he told a representative of the engineering firm retained by Heritage that space would be available on the television station's tower for Heritage's transmission equipment. In addition, DAETC submits that zoning restrictions on Lookout Mountain, the location of Heritage's putative transmitter site, made it questionable whether Heritage, even if it were able to lease space on the tower, would be able to obtain approval of the local zoning authorities to mount its antenna. Consequently, DAETC argues that Heritage's application must be denied since it does not now, and probably never will, have the site it claims in its application. DAETC also takes issue with Heritage's request to amend its application specifying a new transmitter site, on the grounds that Heritage never seriously negotiated a lease of the initial site. And the "new" site, which is also on Lookout Mountain, will also run afoul of the local zoning ordinances, says DAETC.

11. Responding, Heritage admits that the KMGH-TV tower site is no longer available. The loss, it says, was unforeseeable and involuntary. Heritage explains that in August of 1983, it retained Compucon, Inc., an engineering consulting firm, to locate an appropriate site and to prepare the pertinent engineering information for a MMDS facility in the Denver area. Heritage says that it was advised subsequently by Compucon that space for its transmitter antenna would be available on the KMGH-TV tower. Relying on Compucon's assurance, Heritage says it filed the subject application, which contained a detailed engineering analysis designed around this site.

12. Heritage submits that its reliance on Compucon was reasonable and bona fide. It denies DAETC's charge that it made any misrepresentations concerning the availability of the site. What DAETC characterizes as a misrepresentation, says Heritage, was an apparent difference in interpretation of a conversation that took place between Mr. Pozzi and Darryl Cummings, an employee of Compucon. Heritage notes that DAETC does not dispute that Mr. Pozzi was contacted by Mr. Cummings, who was seeking to secure a site on the KMGH-TV tower for Heritage. What is in dispute, says Heritage, is the substance of the conversation that took place between these two men. Heritage has submitted to the Commission notes that were written by Mr. Cummings during, or shortly after, his conversation with Mr. Pozzi. Heritage points out that these notes indicate that Mr. Cummings thought that Mr. Pozzi had agreed to lease space on the tower to Heritage.[5] Therefore, Heritage avers that although Mr. Cummings had apparently misunderstood Mr. Pozzi, it was conveyed to Heritage that space on the tower would be available. Heritage says that because it had no reason to doubt Compucon's veracity it pursued the matter no further.

13. Heritage views the loss of the KMGH-TV site as fortuitous. It points out that its new site, which is on the same tower as Denver's E-Group tentative selectee, offers several advantages over the KMGH-TV site. One of those cited by Heritage is that the new site permits colocation of the Channel Group E and F, which eliminates interference between the two MMDS stations and at the same time provides interference protection to all existing and permitted ITFS users. Consequently, Heritage concludes that its site change serves the Commission's interest in eliminating interference between cochannel and adjacent channel users.

14. Heritage dismisses DAETC's claim that zoning restrictions make the availability of Heritage's site seem unlikely. First, Heritage notes that its move to a different site moots DAETC's argument. It also points out that zoning questions arise only in those instances in which a local zoning board has made a prior denial of an applicant's request to build the proposed facility. Therefore, because there has been no such determination here, says Heritage, DAETC has not made a showing sufficient to raise a site availability question.

15. *Interference* : DAETC avers that although Heritage's proposed MMDS facility would be electrically compatible with DAETC's existing ITFS system, the proximity of the KMGH-TV tower to DAETC's transmission site will, because of electrical interference, foreclose DAETC from establishing additional receive points in the western Denver suburbs. Heritage's decision not to colocate its transmitter with DAETC's, concludes DAETC, will therefore produce serious long-term interference consequences to both operations.

16. Finally, DAETC submits that because grandfathered ITFS systems, including DAETC's, are allowed to interfere with subsequently-authorized MMDS systems, Heritage will experience considerable interference in some of the most populous areas which it proposes to serve. These areas of interference are so significant, says DAETC, as to call into question the viability of Heritage's entire MMDS proposal.

17. In response, Heritage argues that DAETC's allegations of interference are even less meritorious than those concerning the site issue. It says that DAETC is demanding interference protection to receive points that do not exist. This, says Heritage, cannot be done through the Petition to Deny process. Furthermore, says Heritage, the interference analysis that Heritage filed with the Commission demonstrates that its MMDS facility will not cause unacceptable interference to DAETC or any other existing licensee or permittee. For these and the other stated reasons, Heritage requests that the petition to deny filed by DAETC be rejected.

Discussion

18. We are unpersuaded by DAETC's arguments that Heritage intentionally misrepresented that space on the KMGH-TV tower would be available for its use. There is no evidence that challenges Heritage's explanation that the misinformation was the product of a misunderstanding between Messrs. Pozzi and Cummings. Furthermore, DAETC has presented no evidence that Heritage knew that what it was told was not the truth. The reasonableness of Heritage's reliance is another matter, however. Verbal assurances are not encouraged. This type of showing carries considerable .pa risk to the applicant. If the site becomes unavailable the applicant generally will not be allowed to select an alternate site for its transmitter. He would be "cut-off" from the application process.[6]

19. Heritage's proposed new site will require, *inter alia*, a change in antenna type and orientation, polarization and equivalent isotropically radiated power ("EIRP"). It, therefore, necessitates a "major" amendment to Heritage's application. 47 C.F.R. § 21.23(c)(2). We believe that the public interest would be best served by excepting Heritage's application from the "cut-off" provisions of the Commission's Rules. Heritage has contracted with Midwest Cable & Satellite, Inc. ("Midwest"), the tentative selectee of Denver's E Group channels, to colocate its transmission antenna with Midwest's. The two antennas will be side-mounted on an existing tower at Lookout Mountain. Midwest had previously secured an option to lease space on the tower for its antenna and for any antenna that the adjacent channel licensee might utilize. Space is, therefore, available. Colocation is encouraged by the Commission as an effective means of increasing spectrum efficiency through the reduction of the harmful effects of out-of-band radiation emissions and the elimination of adjacent channel interference. We have found that "[i]f the adjacent channel transmitters are not colocated, the probability of the out-of-band emissions causing harmful interference is much greater." *First Report and Order* (Gen. Docket 80-113) 98 FCC 2d 68, 118 (1984). We have found in a companion matter that the colocation of the Heritage and Midwest transmitters has an added advantage of reducing cochannel interference between Midwest and DAETC. *See Midwest Cable & Satellite, Inc.*, Mimeo No. DA 86-218, released November 20, 1986. Consequently, in light of the foregoing, we will wave the "cut-off" rules and grant Heritage's amendment to its application to specify a change in site as well as the accompanying technical modification that the site change requires.

20. Regarding the zoning question raised by DAETC, the Commission traditionally has held that while an applicant must have reasonable assurance of obtaining local zoning approval for its antenna proposal, there is a presumption that zoning approval will be granted. The presumption, however, may be rebutted by a "reasonable showing" that the applicant cannot obtain zoning approval. DAETC has failed to present a "reasonable showing" that zoning restrictions will preclude Heritage from constructing its MMDS facility. *See, e. g., Northbanke Corp.*, 46 Rad. Reg. (P&F) 2d 453, 457 (1979). Instead DAETC has tendered a letter from a representative of the Jefferson County Planning and Zoning Department, stating that any effort to mount a MMDS transmitter antenna on an existing tower at Lookout Mountain will require rezoning, but refusing to declare that such an application would not be approved.

21. DAETC's allegations of interference are based on an apparent misunderstanding of the Commission's policies. As was noted previously, none of DAETC's currently registered receive points will experience unacceptable interference from Heritage's facility. DAETC is seeking protection to receive points that it does not have and perhaps never will have.[78] The Commission has stated: We expect existing ITFS licensees to cooperate with would be MDS applicants to make channels available. We believe that cooperation between MDS providers and ITFS licensees could result in benefits to each. The ITFS licensee could benefit from the technical expertise of MDS operators and the MDS operators would benefit from access to the ITFS spectrum. Most importantly, the public will benefit from more intensive use of the spectrum. *First MMDS Order, supra*, at p. 147 (1983). Filing a petition to deny alleging interference to unspecified receive points directly contravenes what the Commission expects of ITFS permittees and licensees. .pa

CONCLUSION

22. Neither United nor DAETC has raised any substantial and material question of fact with respect to the qualifications of Heritage that would require further administrative action. We, therefore, conclude that Heritage has made an adequate demonstration that it is legally, technically, financially and otherwise qualified to be awarded the construction permit to build a MMDS facility on Channel Group F at Denver, Colorado.

23. Accordingly, IT IS ORDERED, That the petitions to deny filed by United and DAETC ARE DENIED.

24. IT IS FURTHER ORDERED, That the "Opposition to Petition for Leave to Amend" filed by DAETC IS DENIED.

25. IT IS FURTHER ORDERED, That the "Petition for Leave to Amend" filed by Heritage IS GRANTED.

26. IT IS FURTHER ORDERED, That the above-captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Report and Order (Gen. Docket No. 80-112), 54 Rad. Reg. (P&F) 2d 107 (1983) (hereinafter cited as First MMDS Order).

[2] The E Group channels are: E1-2596 to 2602 MHz, E2-2608 to 2614 MHz, E3-2620 to 2626 MHz and E4-2632 to 2638 MHz. The F Group channels are: F1-2602 to 2608 MHz, F2-2614 to 2620 MHz, F3-2626 to 2632 MHz and F4-2638 to 2644 MHz. Each applicant is permitted by Section 21.902(d)(2) of the Commission's Rules to submit only one application for either all 4 E Group channels or for all 4 F Group channels.

[3] Second Report and Order (Gen. Docket No. 80-112), FCC 84-568, 50 Fed. Reg. 5,983 (1985).

[4] Heritage has tendered an amendment to its application in response to the Bureau's request of October 25, 1985, for additional information.

[5] Mr. Cummings is no longer employed by Compucom. The present custodian of Compucom's MMDS files, Wayne Fish, located the notes. The notes which state, "Larry Pozzi agreed to lease arrangements letter of confirm will follow" (sic), and Mr. Fish's Certification are contained in Heritage's "Consolidated Reply to Petitions to Deny".

[6] Change of site almost always involves a "major" amendment that requires that the application be treated as if it were newly filed. The rules generally prohibit these "new" applications from being accepted for filing. Therefore, the applicant ordinarily would be "cut-off" from the application process.

[7] No receive point used by a lessee of the ITFS facilities transmitting on the E or F Group channels will be protected from harmful interference caused by MMDS facilities operating on these channels. *See* First MMDS Order, *supra* at 148 n. 44.

[8] DAETC's petition is concerned with the KMGH-TV site, which Heritage no longer proposes to use. DAETC's "Opposition to Petition for Leave to Amend" does not contain any allegations of interference that would result if Heritage were allowed to colocate its transmitter with Midwest. We believe our analysis of DAETC's allegations of interference caused by Midwest is applicable to Heritage's proposal as well. *See* Midwest Cable & Satellite, Inc. *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-400

Transmittal Nos. 504 and 559
AT&T Communications
Tariff F.C.C. Nos. 9, 10, and 11

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1986; Released: December 3, 1986

By the Chief, Common Carrier Bureau:

1. In *AT & T Communications, Restructuring of Private Line Services*, 103 FCC 2d 77, 131-32 (1985) (*May 28 Order*), the Commission determined that AT&T's continued reliance on rate center pricing of its "local channel" offerings[1] under AT&T Tariff No. 11 needlessly complicated rate comparisons between AT&T's offerings and the underlying special access service that private line customers could obtain directly from local exchange carriers (LECs). Although the Commission allowed the tariffs to become effective without rejection or suspension, the Commission directed AT&T to file tariff revisions within six months to implement a serving wire center (SWC) pricing regime. On November 27, 1985, AT&T filed Transmittal No. 504, which revised its private line tariffs (AT&T FCC Nos. 9,10, and 11) to implement SWC pricing. That transmittal also increased rates for Tariff No. 11 services for the purpose of augmenting revenues by an estimated 19 percent or $290 million. Transmittal No. 504 became effective on January 11, 1986.

2. AT&T states that Tr. 504's serving wire center (SWC) pricing of local channels replicates the mileage measurement regime employed by the LECs under whose tariffs AT&T obtains special access for resale under its own Tariff No. 11. In addition, the six service components that compose the pre-January 11, 1986 rate structure in Tariff No. 11 have been recast into three local channel components. AT&T estimates that the structural changes alone, because they establish a mileage measurement and pricing regimen for AT&T's local channel components that more accurately reflects the access expense incurred by AT&T under LEC tariffs, will recover an additional $55 million in calendar 1986 from recurring rate elements -- an amount that would otherwise persist as a revenue deficiency. Related changes in nonrecurring charges (NRCs) are projected to recover another $10 million.

3. AT&T contends that, notwithstanding the SWC revisions, its private line category revenues in 1986 would fall at least $225 million short of levels necessary to support the authorized rate of return. AT&T proposes to recover this shortfall by applying a rate adjustment factor (RAF) of .101 (*i.e.*, 10.1 percent increase) to recurring charges for all local channel services, generating $158 million in additional revenue, and by separately applying a 30 percent surcharge to local channels provided in independent telephone company service areas, generating an estimated $67 million.[2]

4. Petitioners contend that they were not given sufficient time to prepare petitions, that the implementation of SWC pricing should be delayed because it will compound existing billing disputes, and that AT&T failed to provide customer-specific assessments of rate impact. Those claims do not provide any basis for an investigation. The Commission's *May 28 Order* had mandated SWC pricing, the pleading schedule was established by the Bureau,[3] and the Communications Act does not impose any obligation upon carriers to assess the consequences of a tariff filing for each individual customer.

5. Petitioners contend that failure to suspend additional lead/lag charges prejudices the pending investigation of such charges. That contention is not well founded. It is well established that service may be offered despite the prospect that provisions that are already in effect may be found unlawful.[4] The tariff rates and provisions are subject to adjustment on the basis of determinations the Commission may make in the Docket 85-400 investigation of the AT&T private line tariffs, and the Docket 85-166 investigation of the underlying LEC special access tariffs.[5]

6. Petitioners argue that AT&T should not have based its rate adjustment factor (RAF), set to recover "other access expenses," on 1985 operating experience. AT&T's operating experience in 1985 is atypical, petitioners contend, yet AT&T recognizes the prospect of reductions in extra expenses only with respect to NRC development (and there only with regard to the lead/lag factor), and not at all with respect to recurring charge expenses.

7. AT&T states in its reply that notwithstanding unusual operational and financial circumstances present in 1985, it anticipates that 70 percent of its local channel services will still engender extra billing expense in 1986. Description and Justification, Appendix B, at 1. Given the frequency of LEC tariff revisions (including mid-course corrections), outstanding billing disputes, and the prospect that rate increases and regulatory developments will occasion continued customer exploration of service alternatives, continuation of an unusually high level of billing inquiries does not seem an unreasonable premise for ratemaking. These charges are, of course, subject to any adjustments that may be required in the Docket 85-400 investigation.

8. ARINC contends that AT&T confronts an "uneconomic incentive" to favor circuit configurations that emphasize its own interoffice channel (IOC) components (on which it may earn a return) over local channels (which are generally expensed), to an extent not warranted by objective comparison with other configurations that make greater use of LEC facilities. ARINC urges that AT&T be required to inform customers of their current physical circuit routing and any proposed pricing changes under the SWC structure and that customers be permitted to select the "least cost alternative" without an installation charge "penalty." ARINC contends that such actions would enable customers to reconfigure their circuits to "take advantage of efficiencies previously hidden by AT&T's artificial rate center pricing" and thereby avoid significant rate increases.

9. As previously noted, SWC pricing was mandated by the Commission in the *May 28 Order*. In these circumstances, we cannot find that an investigation would be

warranted to determine whether AT&T's failure to provide free reconfigurations for customers who now find an alternative configuration will be less costly is an unreasonable practice.

10. Dow Jones, in a related argument, asserts that AT&T's stated recoupment of expenses for 500,000 additional miles of local channel facilities implies physical reconfiguration of existing arrangements (*e.g.*, rehoming circuits on different offices). Absent an explanation of the source of additional mileage, Dow Jones contends, customers should not be charged for such reconfiguration. AT&T states in its Reply (at 12-13 n.****) that it originally developed Tariff No. 11 local channel rates through its own records of customers' SWCs -- records later found to depart substantially from the more up-to-date records maintained by LECs for billing purposes. The result was to initially understate the access mileage involved in providing local channels, thus reducing the revenue recovered by AT&T for providing those channels. As noted, the restructure does not charge customers for any physical reconfigurations, except those requested by customers; charges for additional mileage that has heretofore not been recognized do not involve physical circuit reconfiguration, but simply the more accurate pricing of existing circuits.

11. UST and other petitioners contend that AT&T's estimate of the incremental effect of generally higher independent access tariff rates on its operating expenses in independent service areas is unjustified, as are the "competitive disadvantages" that will confront customers located in independent service areas. They argue that the separate rate treatment of independent areas within individual states, is actually a deaveraging of end-to-end private line services on an unrepresentative basis.

12. AT&T states in its Reply that replication of its three-state sample study of independent rates establishes the test states' validity as indicators of the national ratio between independent and Bell Operating Company (BOC) service areas. Replication of AT&T's sample study adjusted the estimate of aggregate revenue necessary to reflect the independent rate increment from $67 to $66.3 million.[6] We do not find a sufficient possibility that the independent surcharge will result in unreasonable discrimination to warrant investigation.

13. Petitioners contend that the lead/lag costs[7] postulated by AT&T for its timely provisioning of local channels used in conjunction with AT&T's network overlap with those of the access coordination function (ACF) element. In its Reply, AT&T distinguishes between its internal costs, recovered in the ACF, and the costs incurred directly from its dealings with LECs, including lead/lag expense. We expect to clarify the question of possible overlaps between these rate elements in the private line investigation.

14. The petitioners' contention that the lead/lag rate component should not be attributed to local channels when such channels are obtained for AT&T customers but are not then connected to the AT&T network raises no difficulty. Customers requiring no synchronization of local circuit components with AT&T's IOC elements have no evident reason to order local channels from AT&T. To the extent that customers consider AT&T's application of a lead/lag component an unmerited burden in either context, they remain free to order this circuit component directly from LECs, and assume direct responsibility for the synchronization of service segments.

15. Petitioners assert that existing charges in Tariff No. 11 for additional engineering, changes in service arrangements, or cancellation, already recoup these expenses so that recovery of such functional components by a rate adjustment factor (RAF) is duplicative. Petitioners variously contend that the RAF fails to separate trouble isolation, special engineering, and other costs from those already recovered under AT&T's LC and ACF rate elements. The petitioners' argument, however, fails to recognize the distinction between ACF activities necessarily provided by AT&T as an internal operation -- the component assembly and coordination functions recognized in the *May 28 Order* as necessary to meet the operational consequences of divestiture --and activities furnished by LECs in offering their local private line services to AT&T and others. Clearly, these are activities performed by different entities; the associated costs are separable and, indeed, reflect the partition of assets made by divestiture. Moreover, the prospect of overlap between rate elements is already committed to the pending investigation.

16. Petitioners also contend that identifiable one-time charges should not be imposed on all customers on a recurring basis or on a per-circuit basis that assertedly penalizes multipoint customers; and that RAF costs are not caused by particular classes of users. Were this proposition established as asserted, it would also establish a conflict with the Commission's rate structure guidelines, which require, *inter alia*, that rate elements be consistently defined and employed. *See generally Private Line Rate Structure and Volume Discount Practices*, 97 FCC 2d 923 (1984). As a practical matter, AT&T cannot reasonably be required to "pass through" LEC bills on a more granular basis than the underlying LEC charges enable. That AT&T is unable to pass through these LEC charges directly to specific AT&T customers, or to its own tariff elements,[8] requires their recovery through some form of surrogate.

17. Any rate adjustment factors employed, however, must be justified by cost support information of a specificity commensurate with the information that is available to AT&T from the LEC. The present record is silent even on the extent to which LEC charges driving the RAF arise from different types of service provided under AT&T tariffs, or the extent to which different circuit configurations within a service type (*e.g.*, voice grade, multipoint and two-point circuits) might occasion such charges. AT&T has not explained why it applied the RAF indifferently to such technically divergent services as television and voice grade service, or 1.544 Mbps service and telegraph. Further investigation is required to determine whether the application of the RAFs results in unreasonable discrimination or undue preferences. We direct AT&T to submit a detailed explanation of the information available to it that resulted in this methodological decision. This explanation should be prepared and submitted as a supplemental submission required as part of the investigation in Docket No. 85-400.

18. Three petitioners contend that the billing/inquiry charge added to fixed rates for local channel service is unwarranted, because it is based on atypical 1985 labor experience and, if not inflated, is based on operating inefficiencies that should be charged to AT&T's shareholders. While the unusual circumstances affecting 1985 operations may not recur, other difficulties outside AT&T's control may entail similarly unusual burdens on the carrier's billing/inquiry functions. AT&T customers

have the alternative of obtaining local channels separately from the exchange carrier and thereby avoiding any rate burden from AT&T's internal difficulties. In these circumstances, an investigation of the billing inquiry charge is not warranted.

19. On February 20, 1986, AT&T proposed revisions to Tariff No. 11, under Tr. No. 559, to remedy its failure in Tr. No. 504 to apply the RAF to nonrecurring charges. Two petitions were filed by ARINC and Ad Hoc. Their principal contentions were that AT&T's anticipated revenue shortfall had been inconsistently calculated in the subsequent corrective filing, and that the shortfall posited in Tr. 504 was compromised by corrected 1986 earnings estimates for the private line category set forth in the carrier's Docket No. 84-800 waiver request. By letter of March 7, 1986, the Chief of the Tariff Division sought further explanation of the different earnings estimates and demand figures supplied in the tariff, and in the Docket No. 84-800 context as well. The carrier's explanation of those matters, contained in a March 12, 1986 letter from Thomas H. Norris, appears to be satisfactory. The revisions proposed by Tr. No. 559 became effective March 14, 1986.

IV. CONCLUSION

20. For the reasons stated above, the Bureau has determined that AT&T's implementation of serving wire center pricing, with the attendant rate increases, raises no issues requiring further investigation, other than questions raised by the uniform application of the rate adjustment factor across different private line services. As described in the text, issues already designated in the private line investigation will be resolved there; customers are protected in the event of determinations adverse to the carrier by the continuing accounting orders imposed in the *May 28 Order*.

V. ORDERING CLAUSES

21. IT IS THEREFORE ORDERED that the petitions filed against AT&T Communications Transmittal No. 504 by Ad Hoc Telecommunications Users Committee, ADAPSO, Aeronautical Radio, Inc., American Financial Services Association and Bunker Ramo Corporation, Dow Jones and Company, Inc. and Telerate Systems, Inc., Federal Executive Agencies, Information Industries Association, J.C. Penney Company, Inc., Lexitel Corporation, Reuters Limited, Television Service User Parties, and US Telecom, Inc., ARE GRANTED to the extent described herein and in all other respects ARE DENIED.

22. IT IS FURTHER ORDERED that AT&T Communications shall submit not later than 30 days after the date of release of this Order, in CC Docket No. 85-400, a detailed explanation of the justification for adopting a rate adjustment factor methodology that reflects no distinctions between individual private line service offerings. Parties wishing to comment on AT&T's explanation shall submit comments no later than 45 days after the date of release of this Order.

23. IT IS FURTHER ORDERED that AT&T Communications shall hereafter update information used to support rate adjustment factors, lead/lag factors, or billing expense factors, on an annual basis, at the time it submits revisions to reflect local exchange carriers' annual access filings.

24. IT IS FURTHER ORDERED that the petitions filed against AT&T Communications Transmittal No. 559 by the Ad Hoc Telecommunications Users Committee and Aeronautical Radio, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

APPENDIX

Petitions and comments with respect to AT&T Communications Tariff F.C.C. Nos. 9, 10 and 11, Transmittal No. 504, were filed by the following parties:

Ad Hoc Telecommunications Users Committee (petition to reject or suspend)

ADAPSO (comments in support of Ad Hoc)

Aeronautical Radio, Inc. (petition for rejection or suspension)

American Financial Services Association and Bunker Ramo Corporation (joint petition to suspend)

Dow Jones and Company, Inc. and Telerate Systems, Inc. (joint petition for rejection or suspension)

Federal Executive Agencies (petition for rejection or suspension, investigation and an accounting)

J.C. Penney Company, Inc. (petition to reject or suspend)

Lexitel Corporation (petition to reject or in the alternative to suspend and investigate)

Reuters Limited (petition to suspend and investigate)

Television Service User Parties (petition to reject or, in the alternative, to suspend and investigate)

US Telecom, Inc. (petition to reject or suspend)

FOOTNOTES

[1] Under AT&T tariff terminology, "local channel" refers to private line service provided under Tariff No. 11 that does not involve AT&T's interexchange transmission facilities. This includes local channels that involve bridging functions at a LEC office, shown as "bridged channels" or "interbridge channels" in Tariff No. 11. For clarity we characterize these local distribution services as "special access" when referring to the underlying LEC offerings.

[2] This approach to independent company rates has since been modified by Transmittal No. 621, which replaced a state-specific surcharge on independent company rates with a LATA-specific surcharge calculated by reference to the dominant BOC in the independent company's specific LATA. Transmittal No. 621 became effective July 1, 1986.

[3] As the revisions' effective date was deferred and the deadline for petitions was extended, prospective petitioners actually had a longer time in which to prepare pleadings than the period routinely provided for 45-day filings by Section

1.773(a)(2)(ii) of the Commission's Rules, 47 C.F.R. § 1.773(a)(2)(ii). (Petitions and comments are listed in the Appendix.)

[4] *See, e.g.*, Nader v. FCC, 520 F.2d 182, 188 (D.C. Cir. 1975).

[5] Thus, the television service users' contention that failure to exclude television services from SWC pricing prejudices their claim in the special access investigation is also unfounded. However, the Commission did subsequently reject the claim that television service special access should be rated differently from other services. Investigation of Special Access Services of Local Exchange Carriers, FCC 86-52, released Jan. 24, 1986, *recon. denied*, FCC 86-466, released Nov. 4, 1986.

[6] The state-by-state replication calculations were itemized in a January 29, 1986 letter from Thomas H. Norris, AT&T Communications, to the Chief, Tariff Division.

[7] For AT&T to assure the synchronized availability and operational compatibility of all components involved in providing an end-to-end circuit, it must order LEC-furnished components a short time in advance of its own date for delivery of the entire assembly to the customer. Similarly, when customers terminate such arrangements with AT&T, AT&T continues to incur the LEC charge for the time necessary for AT&T to issue its own termination-of-service instructions to the LEC (or, possibly, re-use the circuit to fulfill a pending service order). These costs are the "lead" and "lag" costs, respectively, of service provided by synchronizing components furnished by different entities.

[8] Even if LEC billing tracked AT&T's individual customer accounts perfectly whenever AT&T obtains facilities on a customer-specific basis, AT&T remains free to obtain large-capacity facilities from LECs and derive smaller-capacity channels to meet its customers' requirements, and this can afford significant operating efficiencies. Thus, even the furnishing of highly detailed billing information by LECs would not end the necessity of using surrogates to develop rates charged AT&T's customers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

AMATURO GROUP, INC.
(Assignor)
and File No. BALCT-860716KG

CITADEL COMMUNICATIONS, LTD.
(Assignee)

For Assignment of License
of Station KBGT-TV, Channel 8
Albion, Nebraska

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1986Released: November 13, 1986*

By the Commission:

1. The Commission has before it for consideration: (1) an application to assign the license of television Station KBGT-TV, Channel 8, Albion, Nebraska, from Amaturo Group, Inc. (Amaturo) to Citadel Communications, Ltd. (Citadel); (2) a petition to deny the assignment application filed by KTIV Television Company (KTIV), licensee of Station KTIV(TV), Sioux City, Iowa; and (3) responsive pleadings.

2. Citadel is the licensee of Station KCAU-TV, Sioux City, Iowa. The acquisition of KBGT-TV will result in an overlap of the predicted Grade B contours of those stations. Citadel proposes to operate KBGT-TV "primarily as a satellite" of KCAU-TV and requests that the assignment application be granted pursuant to the "satellite exception" provision of the Commission's duopoly rule for television stations, Section 73.3555(a)(3).[1] Section 73.3555(a)(3) of the Commission's Rules provides that "no license for a television broadcast station shall be granted to any party . . . if such party director indirectly owns, operates or controls one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations . . . ." However, Note 5 to Section 73.3555 states that "paragraph (a) through (d) of this Section will not be applied to cases involving television stations which are primarily 'satellite' operations," and "such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest."

3. In support of its proposal to operate KBGT-TV as primarily a satellite of KCAU-TV, Citadel has submitted an engineering study that shows that the Grade B contour of KCAU-TV encompasses 44,050 square kilometers and a population of 626,324 persons. The study indicates that the Grade B contour of KBGT-TV encompasses 45,240 square kilometers and a population of 548,839 persons. The overlap area would encompass 8,490 square kilometers. The population contained in this area is 86,359 persons. With respect to the Grade B service of KCAU-TV, 19 percent of the area and 14 percent of the population will receive duplicated coverage. With respect to KBGT-TV, 19 percent of the area and 16 percent of the population will receive duplicated coverage.

4. Citadel contends that, for all but the last two years of its 22 years on the air, KBGT-TV has operated as a satellite. The present licensee, Amaturo, has informed Citadel that by the year's end KBGT-TV will have lost nearly $5,000,000 since it began independent operation in 1983. In fact, Amaturo has submitted an affidavit from its President which indicates that the heavy financial losses sustained from Amaturo's operation of KBGT-TV have made it necessary to either sell the station or take it off the air.

5. Citadel states that KBGT-TV is the only television station licensed to Albion. No other station provides Grade B coverage to Albion and only three stations provide Grade B service to Boone County, in which Albion is located. If KBGT-TV were to go dark, all of Albion and much of Boone County would be without Grade B service.[2]

6. Citadel maintains that Albion cannot support the operation of an independent television station. Reportedly, this is caused by the decline of an already small advertising and audience base combined with a troubled economy. From 1970 to 1980, Albion's population has declined by 3.7 percent to 1,977 people. According to Citadel, the region, which is in large part dependent on agriculture, continues to suffer economic difficulties. In addition, Citadel asserts that justification for a satellite operation may be inferred form Albion's market size. *Capitol Broadcasting Co.*, 54 RR 2d 811, 814, n.9 (1983). Albion is unranked as an independent television market. However, Citadel states that the result of totaling the Area of Dominant Influence (ADI) television households in the counties to which it provides significant Grade B coverage and that are otherwise considered part of the Lincoln-Hastings-Kearney ADI,[3] would make Albion the 197th market.

7. Citadel states that, although Albion's market size and past history justifies a 100 percent satellite operation, it proposes some local origination from KBGT-TV. Furthermore, Citadel contends that KBGT-TV's viewers will benefit from news and public affairs programs of regional significance locally produced at KCAU-TV. Finally, Citadel offers that its proposal will result in continued service in areas that would otherwise go unserved.

8. KTIV, licensee of Station KTIV-TV, Sioux City, Iowa, alleges that grant of the assignment application would not be in the public interest. Citadel proposes operation of KBGT-TV as "primarily a satellite" of its commonly owned station KCAU-TV, Sioux City, Iowa, an ABC affiliate. When the application was filed, ABC had not consented to the rebroadcast of ABC programming on KBGT-TV. Consequently, KTIV asserts that Citadel has failed to show that KBGT-TV will be able to comply with the five percent limit on program origination, so as to qualify as "primarily a satellite." Therefore, KTIV avers that KBGT-TV does not qualify for the Note 5 exception to Section 73.3555 of the Commission's Rules. However, on September 10, 1986, Citadel submitted a copy of a letter in which ABC indicates its willingness to affiliate with KBGT-TV. Accordingly, the petition to deny has become moot and will be denied.

9. In the past, we have authorized satellite stations in situations where overlap would exist between the parent and the satellite station as a means of providing television service to small communities having an insufficient economic base to support a full-service television operation. One means of carrying out the goal of bringing service to these communities is reflected in Note 5 to Section 73.3555 of the Rules, which relaxes the multiple ownership rules for a station operating as a satellite or "primarily as a satellite." When satellites were first considered, they were authorized only in communities having no local television service. *Multiple Ownership Rules*, 45 FCC 1728, 1735 (1964). That standard has evolved over the years in order to provide the public in smaller markets with a choice of service. Thus, even where a full-service station already serves an area, we have authorized competing satellite operations so long as the applicant has undertaken to establish a local studio and provide some local programming. *See, e.g., Midcontinent Broadcasting Co. of Wisconsin*, 12 FCC 2d 111 (1968); *Meyer Broadcasting Co.*, 67 FCC 2d 593 (1978); *aff'd sub nom., Dickinson Broadcasting Corp. v.* F.C.C., 593 F.2d 1371 (D.C. Cir. 1979). See also Capitol Broadcasting Co., above.

10. We believe that a sufficient showing has been made to justify authorization of a satellite operation in Albion. Citadel has submitted information to support its contention that Albion will not support a full-service television station. As reported, the local economy is depressed due in part to the declines in agricultural operations as well as in the population over the past few years. In addition, the small size of the market also dictates a satellite operation. Citadel does propose some local origination and KCAU-TV's regional programming will also be provided. Finally, Citadel's proposal insures continued operation of Albion's only television station. In view of the above circumstances, and finding the applicants fully qualified, we believe that the proposed satellite operation will serve the public interest, convenience and necessity.

11. Accordingly, IT IS ORDERED, That the petition to deny filed by KTIV Television Company, licensee of Station KTIV(TV), Sioux City, Iowa, IS DENIED.

12. IT IS FURTHER ORDERED, That the application to assign the license of Station KBGT-TV, Albion, Nebraska, from Amaturo Group, Inc. to Citadel Communications, Ltd., IS GRANTED.

13. Copies of this Memorandum Opinion and Order shall be sent Certified Mail-Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] A 100 percent satellite station retransmits all of the programming of its parent, while a station categorized as, "primarily a satellite" airs most of its parent's programs but produces less than five percent of its programming locally. *See e.g., Amaturo* Group, Inc., 68 FCC 2d 899 (1978).

[2] Only one of the three stations, KXNE-TV, a noncommercial educational station, provides service to more than a de minimis portion of the county.

[3] When KBGT-TV, as KCNA, operated as a satellite of KHGI-TV, Kearney, Nebraska, it was treated as part of the Lincoln-Hastings-Kearney ADI.

*Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

November 12, 1986

BY DIRECTION LETTER

Released: November 13, 1986*

Metromedia Broadcasting Corporation
5151 Wisconsin Avenue
Washington, D.C. 20016

Metropolitan Broadcasting Corporation
655 Third Avenue
New York, New York 10017

In re: KRLD(AM), Dallas, Texas
BAL-860716GG

WIP(AM) & WMMR(FM)
Philadelphia, PA
BAPL-860716GH & BALH-860716GI

WNEW(AM) & WNEW-FM, New York, NY
BAL-860716GJ & BAPLH-860716GK

KMET(FM), Los Angeles, CA
BALH-860716GL

WASH(FM), Washington, DC
BALH-860716GM

WOMC(FM), Detroit, MI
BALH-860716GN

WWBA(FM), St. Petersburg, FL
BAPLH-860716GO

Gentlemen:

This letter concerns the subject applications of Metromedia Broadcasting Corporation ("Metromedia") for authority to assign the licenses (and the permits in some instances) and to sell the assets of the subject radio broadcast stations to Metropolitan Broadcasting Corporation ("Metropolitan").

Metropolitan is a wholly owned subsidiary of Metropolitan Broadcasting Holding Company ("MBHC"). Metropolitan was organized at the direction of the Management Group of the Metromedia Radio Stations and Morgan Stanley & Co. Inc. with the intent to purchase and operate the subject stations. Morgan Stanley Leveraged Equity Fund, L.P. ("the Fund") will purchase a 20% equity interest in MBHC when the closing for the sale of the subject stations takes place. Further, at the time of closing, three different classes of stock will be issued, each of which will be entitled to elect one director. The Class C common stock, which will represent roughly 25% of MBHC's total equity, will be held by the Fund and Morgan Stanley & Co., Inc. or its employees and affiliates. Metropolitan anticipates that the Fund's equity position will enable it to elect one of MBHC's three directors.

In addition to its 20% equity interest in MBHC, the Fund owns a minority equity interest (17.39%) in Emmis Broadcasting Corporation ("Emmis"). Emmis owns radio broadcast stations in three of the same markets where Metropolitan proposes to purchase stations currently licensed to Metromedia (Los Angeles, California; New York, New York; and Washington, D.C.). Specifically, Emmis is the licensee of FM station KPWR, Los Angeles; AM station WHN, New York; FM station WAPP, Lake Success, New York which is included in the New York radio market; and FM station WAVA, Arlington, Virginia, which is included in the Washington radio market. Therefore, the subject Metromedia applications present the question of whether the Fund's 20% equity interest in MBHC and its 17.39% interest in Emmis is violative of our multiple ownership rule as to prohibitive duopoly overlap, 47 C.F.R. § 73.3555(a), or of the Commission's cross-interest policy.

Because Emmis is controlled by a single majority shareholder, who owns 60.41% of the voting stock, Metropolitan maintains that the Fund and the other shareholders are prevented from directing the affairs or activities of the corporation. Hence, the interest held by the Fund in Emmis is not cognizable or attributable for multiple ownership purposes. Since only the Fund's interest in MBHC is considered attributable for multiple ownership purposes, Metropolitan concludes that §73.3555(a) is inapplicable.

As to the cross-interest aspect of the issue raised by the Fund's ownership in Emmis, Metropolitan further maintains generally that the Commission has rarely found a cross-interest issue to be raised, or found a violation of the policy, where an individual's interest in both stations are minority and noncontrolling interests. In sum, Metropolitan contends that the Fund lacks the ability to direct or influence either company to act in a manner which could result in the diminution of full and fair competition in the markets in question. In support thereof, Metropolitan points out that the competitive nature of the markets concerned eliminates the potential for any anticompetitive conduct likely to exist as a result of the cross-interests.

In reviewing the issues presented, we note that § 73.3555(a) prohibits the assignment of the license of any radio station to any party if the party directly or indirectly owns, operates, or controls one or more radio stations in the same service and the grant of such assignment application would result in any overlap of the predicted or measured 1 mV/m contours of the existing and proposed station to be assigned. Since the single majority shareholder prevents the Fund from directing Emmis' affairs or activities, the Fund's investment in Emmis is not cognizable or attributable under our multiple ownership rule. *See* 47 C.F.R. § 73.3555, Note 2 (b) and our *Report and Order*, 97 F.C.C. 2d 997, 1008-09 (1984), *modified in other respects on reconsideration*, 58 R.R. 2d 604 (1985). Thus, the Fund's equity interests in Emmis and MBHC would not violate our multiple ownership rule, § 73.3555(a), regarding prohibited duopoly overlap.

The cross-interest policy stems from the prohibitions on common ownership and control contained in our multiple ownership rule and is a corollary to the multiple ownership rule. It arises ordinarily where an entity or person has an attributable interest in one medium and a nonattributable interest in another serving substantially the same area. Thus, to allow one entity to exercise an active role in the operation of one medium in a community, coupled with an investment in another media outlet in the same area, has in some instances raised the concern of significant diminution of the arm's-length competition that our cross-interest policy seeks to foster. *United Community Enterprises, Inc.*, 37 F.C.C. 2d 953 (Rev. Bd. 1972); *Cleveland Television Corp.*, 91 F.C.C. 2d 1148 (Rev. Bd. 1982), *rev. denied*, FCC 83-235 (released May 18, 1983), *affirmed sub* nom. Cleveland Television Corp.v.FCC, 732 F. 2d 962 (D.C. Cir. 1984).

Given the particular facts and circumstances of this case, we do not believe that the Fund's interests in MBHC and Emmis violates our cross-interest policy.[1] In light of the foregoing, we believe that grant of the subject assignment applications is in the public interest. Accordingly, your assignment applications ARE GRANTED.

BY DIRECTION OF THE COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Notwithstanding the fact that we have not found a cross-interest violation in this case, issues of cross-interest have been addressed by the Commission since at least 1949. *See, e.g., Minnesota Broadcasting Corp.*, 13 FCC 672 (1949). However, substantial changes have occurred since that time. In particular, the competitive nature of the broadcast marketplace has evolved far beyond the situation that pertained over thirty-five years ago. Moreover, multiple ownership and attribution rules have been adopted and modified, and numerous rules and policies that police private business practices have been eliminated. In view of these changes, we will, in the near future, initiate an appropriate proceeding to assess the continuing need for the cross-interest policy. We reiterate that our action today in finding no violation of our cross-interest policy is dictated by the facts of the case before us and does not suggest any predetermination of the upcoming generic proceeding on cross-interests.

*Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION — Transmittal No. 167

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: November 19, 1986 Released: November 21, 1986*

By the Deputy Chief, Common Carrier Bureau:

1. The above-captioned tariff revisions were filed by the National Exchange Carrier Association, Inc. (NECA) on July 28, 1986, and are scheduled to become effective on November 23, 1986. By these revisions, NECA proposes terms and conditions for an interim 800 exchange service to be offered by Lufkin-Conroe Telephone Exchange, Inc. (Lufkin-Conroe).[1]

2. A petition to suspend and investigate Transmittal No. 167 was filed on October 27, 1986, by US Sprint Communications Corporation (US Sprint). US Sprint asserts that NECA's tariff improperly proposes to allow Lufkin-Conroe to assess both a nonrecurring charge and a recurring charge for interim 800 Service. It notes that other carriers have proposed either a nonrecurring charge or a charge for each 800 call, but not both. In addition, US Sprint notes that Lufkin-Conroe has openly admitted that it is unable to identify the recurring costs associated with screening 800 calls. It therefore argues that NECA's tariff revisions should be suspended and investigated or, in the alternative, that the Commission should require Lufkin-Conroe to submit further justification to support its rates.

3. Lufkin-Conroe replies that the Bureau allowed NECA's earlier Transmittal No. 155, which first proposed interim 800 Service, to become effective even though NECA had represented that its tariff would allow carriers to charge a nonrecurring charge or per call charge, *or a combination of both*.[2] Lufkin-Conroe confirms that it had difficulty identifying recurring costs, but says that it does not include such costs in its rate development. Instead, it calculated its start-up costs and divided those costs by an anticipated number of calls to derive a recurring rate. It argues that otherwise its nonrecurring rate would be $934.75 per order. Lufkin-Conroe claims that it uses this approach to reduce the customer's financial burden associated with installation of 800 Service.

4. The Common Carrier Bureau has reviewed the proposed tariff and the pleadings. We conclude that the petitioner has not demonstrated that there is a sufficient likelihood that the tariff revisions would be found unlawful to warrant suspension and investigation at this time.

5. Finally, Lufkin-Conroe's filing raises an issue regarding use of recurring charges to recover nonrecurring costs. That question is closely related to issues that are the subject of our ongoing investigation into nonrecurring charges in CC Docket No. 85-166.[3] Although we are allowing NECA's proposed tariff to become effective as scheduled, the rates set forth therein are subject to the outcome of that proceeding.

6. Accordingly, IT IS ORDERED that the petition filed by the US Sprint Communications Company against the National Exchange Carrier Association, Inc., Tariff F.C.C. No. 1, Transmittal No. 167, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] On July 22, 1986, NECA also filed a petition requesting a waiver of portions of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to allow the establishment of separate recurring and nonrecurring rate elements for the recovery of costs incurred in providing interim 800 access service by local exchange carriers (LECs) participating in the traffic sensitive pool. We granted NECA's petition in an Order released October 24, 1986. *See* National Exchange Carrier Association, Mimeo No. 0328, released Oct. 24, 1986, at para. 1, n.1.

[2] Lufkin-Conroe Reply at 3 (citing Petitions for Waiver of Part 69 to Provide Exchange Access for 800 Service, Order, Mimeo No. 0328, released Oct. 24, 1986; NECA Reply to petitions against Transmittal No. 155, at 1); *see also* National Exchange Carrier Association, Inc. Tariff F.C.C. No. 1, § 6.1.3(C)(1).

[3] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Memorandum Opinion and Order, FCC 86-52, released Jan. 24, 1986.

*Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

October 16, 1986

BY DIRECTION LETTER

Mr. William S. Paley
CBS Inc. Released: October 20, 1986**
51 West 52nd Street
New York, NY 10019

Dear Mr. Paley:

This is in reference to a "Petition and Complaint" filed by Fairness In Media ("FIM") on September 12, 1986, FIM's Addendum to that Petition and your comments on the matters raised by FIM which were filed October 1, 1986. In its filing, Fairness In Media requested the Commission to investigate whether an unauthorized *de facto* transfer of control of CBS Inc. (" CBS") to Loews Corp. ("Loews") and its Chairman, Laurence A. Tisch had taken place. Further, it urged that tbe Commission find that such a transfer of control had taken place and require CBS, Loews, and Tisch to comply with Section 310(d) of the Communications Act of 1934, as amended, by filing the requisite application for Commission approval of the alleged transfer of control.

In support of its request, FIM asserted that, in July 1985, Loews purchased 5% of CBS's common stock and that, pursuant to an agreement reached between the CBS Board of Directors and Loews in October 1985, Loews purchased additional stock to the extent that by, August 1986, its ownership interest in CBS reached nearly 25%. Furthermore, it pointed to statements by Preston Robert Tisch, (President of Loews Corp.), present and former CBS officers and directors, and others to the effect that Laurence Tish intends to assert control over the corporation. Copies of articles that have appeared in various publications concerning these events were attached to the FIM filing.

On September 30, 1986, FIM filed an "Addendum to Petition and Complaint" asserting that subsequent to its original filing Laurence Tisch had become the Chief Executive Officer of CBS and had exercised control over CBS by, for instance, orchestrating the removal of the existing Chairman of CBS and making himself its chief executive. Furthermore, it asserted that Mr. Tisch had,in fact, been exercising significant control .over CBS since December 1985. In support of this allegation FIM argued that cost control measures implemented by CBS in December 1985, were "similar to those implemented by CNA Financial Corporation during the course of its takeover by Loews." FIM again requested that the Commission investigate the situation and require CBS Inc., Loews Corp., and Laurence Tish to comply with Section 310(d) of the Communications Act. Additionally, the Addendum asked that the Commission impose sanctions in the event it determined that an unauthorized transfer of control had taken place.

Subsequent to FIM's original filing, the Chief, Mass Media Bureau, sent a letter to CBS notifying it of the Commission's receipt of the Petition and Complaint and taking note of the press coverage of the management cbanges at CBS. The letter afforded CBS an opportunity to respond. On October 1, 1986, CBS filed its comments signed by you denying that an unautborized transfer of control over CBS had taken place and a memorandum of law in support of these comments. Generally, CBS asserted that management authority over the corporation is exercised by its Board of Directors acting on behalf of the corporation's shareholders. Among the Board's management responsibilities is the oversight of management. In this regard, you stated that on September 10, 1986, the CBS Board, consisting primarily of outside directors, met and that its outside directors together with a single inside director (Walter Cronkite), decided to replace the Chief Executive Officer. This change resulted in the departure of the existing C.E.O. and the election of Laurence Tisch to the position. According to your response, the outside directors and Mr. Cronkite voted to appoint Mr. Tisch as acting CEO on a temporary bases until a new CEO is selected. The Board also appointed a "management committee" chaired by Mr. Tisch and "consisting of a majority of outside directors" to which Mr. Tisch would report between Board meetings. This, you asserted, will "further fortify[] the Board's authority over the operations of the corporation." The Board also named you as Acting Chairman. CBS contended that no transfer of control over the corporation had occurred and that neither you nor the other Board members "intended to surrender control of CBS to. Mr. Tish, nor did he intend to assume such control." Finally, you assert that there exists no agreement between Mr. Tisch and you (who together control approximately 33% of the shareholders' votes) with respect to tbe voting of stockholdings or the positions that you two will take on matters to come before the Board.

The Communications Act contains no definition of "control" for the purposes of Section 310(d) and the Commission has recognized that "there is no precise formula by which control may be ascertained." (footnote omitted.) *In re : Tender Offers and Proxy Contests*, 51 Fed. Reg. 9794, (March 21, 1986), 59 RR 2d 1536, 1542. As recent Commission decisions and policy statements have recognized, the locus of control in a publicly-held corporation can be difficult to place given the varying and diffuse degrees of working control typically exercised at different levels of such corporations. *Id.* at 1543. While a change in ownership is an important factor in determing whether control has been transferred it is not necessarily determinative. *Id.* at 1542. Nor does the Commission consider changes in a board of directors over a period of time to generally constitute a transfer of control. *Id.* at fn. 40. Rather, the determination as to issues of control, " . . . is a complex task which must be done on a case-by-case basis." *Storer Communications Inc. v. F. C. C.*, 763 F.2d 436, 442 (D.C. Cir. 1985).

In the instant matter, application of our prior decisions concerning *de facto* transfers of control to the facts presented compels our determination that, as of the present time, no *de facto* transfer of control over CBS Inc. has occurred. Here we are not dealing with an assertion that *de jure* control over CBS Inc. has shifted. Instead, allegations have been raised that *de facto* control over the corporation has been transferred to Loews and, by extension, to Mr. Tisch. By definition, *de facto* control relies

on facts, on events that have occurred. Unlike a *de jure* transfer of control, where the mere potential to exercise majority vote requires prior Commission consent and in which an abstention from any activity evidencing control or influence does not excuse noncompliance, a finding that a *de facto* transfer of control has occurred depends largely upon a review of the actual operation of the licensee – not upon the potential for some hypothetical future exercise of control. *See News International, PLC*, 97 FCC 2d 349 (1984). Other than cases in which conduct demonstrates that control has actually been exercised, the Commission will find a *de facto* transfer of control to a minority shareholder only where there is clear evidence of that minority shareholder/director's dominance. As an example of the latter, in *George E. Cameron, Jr.*, 91 FCC 2d 870 (Rev. Bd. 1982), *recon. denied*. 93 FCC 2d 789 (1983), *applications for review dismissed as moot*, FCC 84-367 (August 1, 1984), the Review Board found that a 49% shareholder, director and officer possessed *de facto* control of the licensee corporation because he: a) had a 49% interest in the licensee's parent company with an option to increase his interest to nearly 100%; b) was the managing partner of the licensee's parent company and president of the subsidiary/licensee; and, perhaps most importantly, c) held judgments against other principals which, if exercised, "would financially cripple them." *Id.* at 889-890. Additionally, this individual's "long-time subaltern" had been made the station's general manager. This "total dominance" was found to constitute *de facto* control. Similarly, in *Western Gateway Broadcasting Corp.*, 16 FCC 274 (1951), a minority shareholder's demonstrated ability to control both his own and his relatives' shares – relatives who were characterized as completely subservient and "for all practical purposes . . . his pawns or dummies . . . ." – resulted in a finding that the subject minority shareholder had acquired *de facto* control of the licensee without the Commission's consent.

In the instant matter, the Commission is unable to conclude that a *de facto* transfer of control has occurred or that the matters raised by FIM warrant further investigation. Loews is a minority CBS shareholder. More than 75% of the voting power and ownership of CBS remain with the general shareholders who "retain ultimate and legal control" of the corporation. *See Committee for Full Value of Storer Communications, Inc.*, 101 FCC 2d 434, 445, *aff' d sub nom. Storer Communications, Inc. v. F. C. C., supra* ; *cf. Turner Broadcasting System, Inc.*, 101 FCC 2d 322, (1985). Nor is there, at present, any evidence before the Commission that would suggest that Mr. Tisch, himself a minority shareholder, has the sort of influence with the remaining shareholders that the Commission in the past has found to constitute *de facto* control. *See George E. Cameron, Jr., supra* ; *see also Western Gateway Broadcasting Corp., supra*.

This case is therefore unlike *Metromedia, Inc.*, 98 F.C.C. 2d 300 (1984), *recon. denied.*, 56 Radio Reg. 2d (P&F) 1198 (1985), *appeal dismissed*, California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985), in which there was no dispute that John Kluge, who owned 26% of the stock of Metromedia and was the President, Director, Chairman of the Board, Chief Executive Officer and largest stockholder, held de facto control of the corporation. For 25 years, Mr. Kluge had had the power to determine who would serve on Metromedia's Board of Directors. He had nominated a majority of the then current members of the Board and no Board members were nominees of anyone else. Mr. Kluge also controlled Metromedia's management proxy process. In every year since 1959, Mr. Kluge had been designated proxy in management's annual proxy solicitations. Mr. Kluge had had the power to control the voting of virtually all of the Company's stock at every annual meeting during this period. And in Form 10-K Reports and Proxy Statements filed with the Securities and Exchange Commission, Mr. Kluge had been identified as the controlling party of Metromedia, See 98 F.C.C. 2d at 303-306.

Nor could we conclude a de facto transfer of control occurred were we to accept the position urged upon the Commission in CBS's comments filed in Tender Offers and Proxy Contests, *supra*. There, CBS maintained that the Commission's decision in Storer should be limited to its facts because "where stockholders are widely dispersed among numerous individual shareholders and passive institutional investors, actual operational authority - the de facto control with which the Communications Act is concerned - frequently rests with the Board." CBS Comments inn MM Docket No. 85-218 at 46. Assuming, argu endo, that the locus of control of CBS is in its Board of Directors, there is no evidence that the events described in the pleadings constituted a transfer of control for the purposes of Section 310(d). In the instant case it is undisputed tbat the CBS Board, excluding Messrs. Tisch and Paley, voted to disapprove a proposal by the corporation's then Chief Executive Officer to respond positively to any interest evidenced by the Coca-Cola Company in the purchase of CBS; voted to accept the then CEO's resignation; and, elected Mr. Tisch acting CEO and Mr. Paley acting Cbairman of the Board until a new CEO, President and Chairman for CBS were found. Moreover, the Board appointed a Management Committee to "review the Corporation's operations during such transition period and to advise the acting Chief Executive Officer with respect thereto . . . ." While Mr. Tisch clearly plays an important role in the operations of CBS, the Commission possesses no evidence that Mr. Tisch alone or in privity with other Directors under his domination, has obtained ultimate control of CBS. Nor does his appointment by the Board to act as Chief Executive Officer constitute the kind of conduct that by itself demonstrates de facto control. The mere fact that Mr. Tisch's accession may aff ect working control of CBS does not mean that this event constitutes a transfer of control. See Tender Offers and Proxy Contests, *supra* at 1543. As the Court of Appeals has stated:

> Corporate officers or station managers may exercise substantial day-to-day working control; yet FCC approval would not be required before a corporation was allowed to replace such personnel. Directors may also change on an evolutionary basis, e.g., several directors may retire or resign over the course of a year. The Commission only requires that such evolutionary changes be reported on an annual Ownership Report.
>
> Storer Communications, Inc.,v.F.C.C., *supra* at 442.

We are confronted with no evidence that any event transpired in the instant situation beyond those described above. A corporate Board, dissatisfied with the performance of an incumbent CEO, replaced him with another individual. That individual's actions were made subject to review by a Management Committee of the Board –

(composed of the individual and four other Board members whose terms predated that of the new CEO); to approval or disapproval by the Board that appointed him; and, ultimately, to review by the company's shareholders. Most critically, the actions that have taken place have occurred in the context of a corporation that has an active and independent Board of Directors that has been and remains openly antagonistic to CBS coming under the domination of any outside party. We conclude that the events, to date, do not constitute a transfer of control within the meaning of Section 310(d) of the Communications Act of 1934, as amended.

BY DIRECTION OF THE COMMISSION *

William J. Tricarico
Secretary

* Commissioner Dennis not participating.

**Note: Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

October 23 1986*

COMMISSION SEEKS REMAND OF

OF *SHURBERG* V. *FCC*

The Commission has directed the General Counsel to seek remand of *Shurberg Broadcasting of Hartford, Inc.* v. *FCC* so it can compile a record concerning its distress sale policy.

Shurberg Broadcasting is appealing the Commission's grant of Faith Center, Inc.'s request for a distress sale of WHCT-TV, Channel 18 at Hartford, Conn., to Astroline Communications Company.

Under the FCC's distress sale policy, only members of certain minority groups and minority-controlled companies are eligible to buy a station.

Action by the Commission October 23, 1986. Commissioners Fowler (Chairman), Quello, Dawson, Patrick and Dennis with Commissioner Quello issuing a separate statement.

FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF

COMMISSIONER JAMES H. QUELLO

Re: Regarding Commission Decision to Seek Remand of *Shurberg* Appeal Because I was advised by my attorneys at the agency that the Commission's minority and female comparative licensing preference scheme, based on recent Supreme Court case law, was constitutionally suspect, I joined with my colleagues on September 15, 1986, in instructing our General Counsel to request that the United States Court of Appeals remand the *Steele* case. Since that time, I have made clear that I remain, to the extent the law permits, committed to continuing the Commission's long-standing policy of encouraging and assisting minority and female entry into broadcasting.

The Court of Appeals has now requested that the Commission present its views on what effect the position it took in the *Steele* case has on the constitutionality of its minority distress sale policy. an issue Pending in the *Shurberg* appeal. Because recent Supreme Court case law may also call into question the legality of our distress sale policy I am again compelled to join my colleagues in directing that our General Counsel ask the Court of Appeals to remand the *Shurberg* appeal.

I want to make crystal clear, however, *that I am not*, at this time, questioning the wisdom of continuing our minority Policies. I must, of course. study the law to be sure that the Commission's Policies are constitutional. However, as I have said before, I place the burden of proof on those that would challenge the constitutionality of our long-standing minority policies. And I am not expressing agreement with any characterization in our remand *Order* as to what justification is necessary under recent Supreme Court case law to support such policies. This is a matter to which I will give great care when the Commission undertakes a proceeding to study the issue.

*Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

October 23, 1986*

COMMISSION SEEKS REMAND OF

WINTER PARK COMMUNICATIONS. INC. V. FCC

The Commission has directed the General Counsel to seek remand of *Winter Park Communications v. FCC* so that it can decide whether the minority preference granted in that case was of decisional significance. The Commission said it would report back to the Court with its conclusion on this matter within 45 days from the date of a remand order.

Winter Park Communications is appealing the Commission's grant of the application of Rainbow Broadcasting Co. for a new UHF television station to serve the Orlando, Florida metropolitan area. *Metro Broadcasting, Inc.*, 99 F.C.C. 2d 688 Rev. Bd. 1984, *rev. denied*, FCC 85-558 (Oct. 18, 1985).

Action by the Commission October 23, 1986. Commissioners Fowler (Chairman), Quello, Dawson, Patrick and Dennis with Commissioner Quello issuing a separate statement.

FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF

COMMISSIONER JAMES H. QUELLO

Re: Regarding Commission Decision to Seek Remand of *Winter Park Communications, Inc. v. FCC*, Nos. 85-1755, 85-1756.

Because I was advised by my attorneys at the agency that the Commission's minority and female comparative licensing preference scheme, based on recent Supreme Court case law, was constitutionally suspect, I joined with my colleagues on September 15, 1986, in instructing our General Counsel to request that the United States Court of Appeals remand the *Stelle*, case. Since that time. I have made clear that I remain. to the extent the law permits, committed to continuing the Commission's long-standing policy of encouraging and assisting minority and female entry into broadcasting.

I am again compelled to join my colleagues in directing that our General Counsel ask the Court of Appeals to remand the *Winter Park* appeal. I want to make crystal clear, however, *that I am not*, at this time, questioning the wisom of continuing our minority policies. I must, of course, study the law to be sure to be sure that the Commission's policies are constitutional. However, as I have said before, I place the burden of proof on those that would challenge the constitutionality of our longstanding minority policies. And I have reached no conclusion as to what justification is necessary under recent Supreme Court case law to support such policies. This is a matter to which I will give great care when the Commission undertakes a proceeding to study the issue.

*Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Declaratory Ruling
Concerning the Citizenship
Requirements of Sections 310(b)(3)
and (4) of the Communications Act
of 1934, as amended

ERRATUM

Released: October 29, 1986*

The Memorandum Opinion and Order, (FCC 86-406) released October 9, 1986, in the above-entitled matter is corrected to show "Commissioner Dennis not participating" after the phrase " By the Commission."

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

*Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-457

In re Applications of

DIGITAL PAGING
SYSTEMS, INC. File No. 50062-CM-P-74

and

VIDEOHIO, INC File No. 50199-CM-P-74

and

MICROBAND CORPORATION
OF AMERICA File No. 50203-CM-P-74

For Construction Permits
in the Multipoint Distribution
Service for a new station on
Channel 2 at Toledo, Ohio

MEMORANDUM OPINION AND ORDER

Adopted November 21, 1986 Released December 5, 1986

By the Common Carrier Bureau:

1. For consideration are the above-referenced applications. These applications are for construction permits in the Multipoint Distribution Service and they propose operations on Channel 2 at Toledo, Ohio. The applications are therefore mutually exclusive and require comparative consideration. There are no petitions to deny or other objections under consideration.

2. Upon review of the captioned applications, we find that these applicants are legally, technically, financially, and otherwise qualified to provide the services they propose, and that a hearing will be required to determine, on a comparative basis, which of these applications should be granted.

3. Accordingly, IT IS HEREBY ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e) and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the above-captioned applications ARE DESIGNATED FOR HEARING, in a CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, to determine, on a comparative basis, which of the above-captioned applications should be granted in order to best serve the public interest, convenience and necessity. In making such a determination, the following factors shall be considered:[1]

(a) The relative merits of each proposal with respect to efficient frequency use, particularly with regard to compatibility with co-channel use in nearby cities and adjacent channel use in the same city;

(b) The anticipated quality and reliability of the service proposed, including installation and maintenance programs; and

(c) The comparative cost of each proposal considered in context with the benefits of efficient spectrum utilization and the quality and reliability of service as set forth in issues (a) and (b).

4. IT IS FURTHER ORDERED, That Digital Paging Systems, Inc., VideOhio, Inc., Microband Corporation of America and the Chief of the Common Carrier Bureau, ARE MADE PARTIES to this proceeding.

5. IT IS FURTHER ORDERED, That parties desiring to participate herein shall file their notices of appearance in accordance with the provisions of Section 1.221 of the Commission's Rules, 47 C.F.R. § 1.221.

6. IT IS FURTHER ORDERED, That any authorization granted to Digital Paging Systms, Inc., a wholly-owned subsidiary of Graphic Scanning Corporation, as a result of the comparative hearing shall be conditioned as follows:

(a) without prejudice to reexamination and reconsideration of that company's qualifications to hold an MDS license following a decision in the hearing designated in *A. S. D. Answering Service, Inc.*, et al., FCC 82-391, released August 24, 1982, and shall be specifically conditioned upon the outcome of that proceeding.

7. The Secretary shall cause a copy of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Consideration of these factors shall be in light of the Commission's discussion in *Frank K. Spain*, 77 FCC 2d 20 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-456

FAMILY
STATIONS, INC. File No. BPED-840309CS
Augusta, Georgia
Req: 89.1 MHz, Channel 206C2
0.58 kW (H), 450 meters (H&V)
2.0 kW (V)

SOUTH CAROLINA
EDUCATIONAL File No. BPED-840629IO
TELEVISION
COMMISSION
Aiken, South Carolina
Req: 89.1 MHz, Channel 206C1
10 kW (H&V), 377 meters (H&V)

For Construction Permit
for a New Educational
FM Station

HEARING DESIGNATION ORDER

Adopted: November 19, 1986 Released: December 5, 1986

By The Chief, Mass Media Bureau

1. The Commission, by the Chief, Mass Media Bureau acting pursuant to delegated authority, has under consideration the above-captioned mutually exclusive applications of Family Stations, Inc. (Family) and South Carolina Educational Television Commission (SCETC) for a new educational FM station.[1]

2. *SCETC*. SCETC indicates in response to Item 7a, Section V-B and Item 6, Section V-G of FCC Form 340 that its antenna will be mounted on the existing tower of WJBF-TV, Augusta, Georia. Applicant states that the tower is 1282' above ground, while the actual height of this tower above ground is 1292'. Accordingly, SCETC will be required to file an amendment with the presiding Administrative Law Judge to correct this discrepancy.

3. In response to Item 4, Section V-B of FCC Form 340, SCETC states that it proposes to construct its main studio at its transmitter site in Aiken, South Carolina. An additional studio in Columbia, South Carolina is also shown. SCETC has also requested a waiver of 47 C.F.R. § 73.1125 to operate its proposed Aiken, South Carolina station "as a satellite without a main studio in the city of license." It is therefore not clear as to whether the applicant will have a main studio in its community of license in accordance with 47 C.F.R. § 73.1125. Accordingly, SCETC will be required to file with the presiding Administrative Law Judge, an amendment clarifying this inconsistency.

4. The Commission's Rules and Regulations do not provide for routine operation of educational FM "satellite" stations. Accordingly, the Mass Media Bureau has required that applicants for these stations demonstrate how the proposed facilities will serve the needs of the local community of license. SCETC's request for waiver of 47 C.F.R. § 73.1125 is deficient in this respect. In the event SCETC desires to operate its proposed station as a "satellite" station without a main studio in its community of license, it will be required to file an appropriate amendment with the presiding Administrative Law Judge demonstrating how it will serve the local needs of Aiken, South Carolina. In the event SCETC is unable to make the requisite showing, the presiding Administrative Law Judge shall specify an appropriate issue.

5. Review of SCETC's application indicates that $136,250 will be needed to construct the proposed station and to operate it for the first 90 days. To meet its financial obligation, SCETC proposes to construct the station with a Federal grant of $90,000 from a grant from the Public Telecommunications Facilities Program of the National Telecommunications and Information Administration. The remainder of the necessary funds will come "from a fundraising drive." SCETC has failed to notify the Commission as to whether it has received the Federal grant and what additional money it has been able to raise through fundraising. Accordingly, its application is financially deficient and an issue will be specified.

6. Except as may be indicated by any of the issues specified below, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to SCETC, whether, in light of the evidence adduced concerning the deficiency set forth above in this Order, the applicant is financially qualified.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That SCETC file an appropriate amendment with the presiding Administrative Law Judge within 30 days of the date of this Order correcting the height above ground of the tower on which it proposes to mount its antenna.

9. IT IS FURTHER ORDERED, That SCETC file an appropriate amendment with the presiding Administrative Law Judge within 30 days of the date of this Order delineating the location of its proposed main studio.

10. IT IS FURTHER ORDERED, That in the event SCETC will not have a main studio in the community of Aiken, South Carolina, it will file an appropriate amendment with the presiding Administrative Law Judge within 30 days of the date of this Order, demonstrating how the proposed station will meet the needs of its community of license.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing (either individually or, if feasible and consistent with the Rules, jointly) within the time and in the manner prescribed in such Rules and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On June 20, 1984, Southwest Educational Media Foundation (Southwest) filed an application for Augusta, Georgia which was mutually exclusive with Family's application. This application was dismissed by letter on December 10, 1985 pursuant to a November 21, 1984 agreement between Family and Southwest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-233

Amendment of Sec. 73.202(b),	RM-5316
Table of Allotments,	
FM Broadcast Stations.	
(Fulton, Mississippi)	

REPORT AND ORDER

(Proceeding Terminated)

Adopted: November 20, 1986 Released: December 5, 1986

By the Chief, Allocations Branch:

1. The Commission herein considers its *Notice of Proposed Rule Making*, 51 FR 23087, June 25, 1986, issued in response to a request filed by Itawamba County Broadcasting Company, Inc. ("petitioner"), licensee of Station WFTA(FM), Channel 269A, Fulton, Mississippi, proposing the substitution of FM Channel 270C2 for 269A and modification of its license accordingly. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 270C2 for Channel 269A at Fulton, Mississippi, since it could provide the community with its first wide area coverage FM service. The *Notice* was conditioned on the grant of a license for Station WDRM, Channel 271, Decatur, Alabama, to relocate its transmitter site and decrease its facilities to Class C1 standards in accordance with a construction permit issued by the Commission. The license for Station WDRM was issued on October 27, 1986 (BLH 860408KD). The substitution at Fulton can now be made in compliance with the minimum distance separation requirements of Sec. 73.207 of the Commission's Rules provided there is a site restriction 9.2 kilometers (5.7 miles) southwest of the community to prevent a conflict with Station WWWB(FM), Channel 273, Jasper, Alabama.

3. We have authorized in paragraph 5, a modification of petitioner's license for Station WFTA(FM), Fulton, Mississippi, to specify operation on Channel 270C2 in accordance with Sec. 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Secs. 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Secs. 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 20, 1987, the FM Table of Allotments, Sec. 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below:

Community	Channel No.
Fulton, Mississippi	270C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Sec. 316 of the Communications Act of 1934, as amended, that the license of Station WFTA(FM), Fulton, Mississippi, IS MODIFIED to specify operation on Channel 270C2 in lieu of Channel 269A, subject to the following conditions:

(a) The licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Sec. 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Sec. 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-264

A Review of Section 73.1690
Regarding Modifications of
Broadcast Transmitters

ERRATUM

Released: December 5, 1986

The effective date of the Report and Order (FCC 86-484 in the captioned proceeding, released November 4, 1986, is corrected to read December 18, 1986 in order to satisfy the Federal Register 30-day prior notice requirement.

FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
SPANISH INTERNATIONAL COMMUNICATIONS CORPORATION	MM Docket Nos. 83-540 to 83-544 and 84-830 to 84-834
For Renewal of license of: KWEX-TV San Antonio, Texas et al.	File Nos. BRCT-830401LM et al.
BAHIA DE SAN FRANCISCO TELEVISION COMPANY	MM Docket No. 83-545
	File No. BRCT-800730KJ
For Renewal of License of: KDTV (TV) San Francisco, California	
THE SEVEN HILLS TELEVISION COMPANY.	MM Docket Nos. 83-657 and 84-835
	File Nos. BRCT-830601KJ and BPTT-840308IQ
For Renewal of license of: KTVW-TV Phoenix, Arizona, et al.	

ERRATUM

Released: December 5, 1986

In paragraph 7 of the *Memorandum Opinion and Order*, FCC 86R-77, released November 26, 1986, the reproduced version contains numerous italicized passages, which passages are not italicized in the official document.*

Accordingly, apart from case citations and Latin language, paragraph 7 is corrected as follows:

All italicized passages are changed to ordinary type.

By Direction of the Review Board

Allan Sacks
Chief for Law

* The Board is aware that recent reprints of its decisions, reproduced under a new agreement with the Department of Commerce, contain numerous typographical errors, dropped sentences and mis-citations, too many - in fact - to be cured by simple *errata*. The Board regrets these reproduction errors, and is discussing with Commission administrative officials the problem and a possible solution.

Before the
Federal Communications Commission
Washington D.C. 20554

In re Applications of

KANNAPOLIS TELEVISION CO., A JOINT VENTURE	BC DOCKET-NO. 82-259
Kannapolis, North Carolina	File No. BPCT-790928KI
COMMUNITY ACTION COMMUNICATIONS, INC.	BC DOCKET NO. 82-260
Kannapolis, North Carolina	File No. BPCT-800516K0

For Construction Permit for a New Television Station

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1986; Released: December 5, 1986

By the Commission:

1. Before the Commission are: (1) Applications for Review filed October 1, 1984 by Community Action Communications, Inc. (Community) and WCCB-TV, Inc. (WCCB)[1], an Erratum filed October 10 by Community, an Opposition thereto filed October 26, 1984 by Focus Television Company, A Joint Venture (Kannapolis)[2], an Opposition (to WCCB's Application for Review] filed October 26 by Community; and (2) a Joint Petition for Approval of Agreement and Dismissal of Application filed June 19, 1986 by Kannapolis and Community, a Supplement thereto filed July 3, and Comments thereon filed July 2 by the Mass Media Bureau.

I. BACKGROUND

2. Kannapolis and Community are mutually exclusive applicants for a new UHF television station on Channel 64 at Kannapolis, North Carolina. The Review Board, reversing an Initial Decision by then Acting Chief Administrative Law Judge Thomas B. Fitzpatrick, granted Kannapolis' application and denied Community's.[3] The Board imposed a decisive demerit against Community under a character issue, since one of its principals was found to have committed fraudulent land conveyances by placing properties beyond the reach of creditors and to have made two false oaths regarding his assets in a bankruptcy proceeding. In the Board's view, this demerit outweighed Community's advantages for integration of ownership into management and diversification of media control.

3. For the reasons which follow, the Commission will modify the Board s Decision and hold that Community is unqualified to be a broadcast licensee. The recent adoption of the Commission's policy statement on character qualifications in broadcast licensing[4] has made it necessary to reexamine the facts of this case in light of the principles set forth therein. We conclude that pursuant to the *Policy Statement*, Community's application should be denied. Accordingly, we will also deny the parties' request for approval of their settlement agreement, since it calls for granting Community's application and dismissing Kannapolis' application.

II. DECISIONS BELOW

4. At issue is the impact of rulings in two federal court proceedings concerning Community's principal Rev. D. Garland Faw on Community's basic qualifications to be a licensee. Rev. Faw is the pastor and president of Community's owner, Truth Temple, the Chairman of the Board of Community, and the general manager of the proposed station.[5] The court proceedings involve Rev. Faw's role as the president and 50% owner of Tire Savings, Inc. (Tire), a tire retailer. Rev. Faw had personally guaranteed Tire's credit account with Cooper Tire and Rubber Company (Cooper), a tire manufacturer. According to findings made by the U.S. Bankruptcy Court, Rev. Faw engaged in fraudulent conduct, including the making of two false oaths, in the course of a business dispute with Cooper. He was also found to have made fraudulent property conveyances in the course of this same dispute. The following findings set forth the context of the rulings in question.

5. In September 1976, Tire owed Cooper $112,000, and Tire's account went into default. Cooper agreed to make further shipments only on a cash basis, but Rev. Faw stopped payment on the $10,000 check covering the next shipment. Four days later, Rev. Faw conveyed his residence, his principal asset, to Truth Temple without consideration. Under the terms of the conveyance, Rev. Faw continued to live on the property, and mortgage payments were deducted from his salary; he could demand the reconveyance of the property at any time without charge. Rev. Faw did not inform Cooper of the conveyance or of the stop payment order on the check in a meeting with Cooper shortly thereafter to discuss Tire's credit privileges.

6. Thereafter, Cooper sued Tire, and, in January 1978, the U.S. District Court handed down a judgment for $79,000, the amount owed Cooper after Tire's inventory had been repossessed. The next month Rev. Faw conveyed his one-half interest in five lots of commercial property owned with his in-laws[6] to Joel Fowler, Jr. Fowler is the associate pastor of Truth Temple, the president of Community, Rev. Faw's brother-in-law, and the former manager of Tire. Fowler executed an $8,000 promissory note in consideration for the conveyance. However, the record indicates that Fowler made no payments on the note. The record also indicates that Rev. Faw and his wife continued to manage the property and treat it as their own. The Faws' interest in an additional nine small lots of commercial property was not conveyed.

7. In November 1978, the District Court in the Cooper suit set aside Rev Faw's 1976 transfer of his residence to Truth Temple as a fraudulent conveyance. The District Court found that the transfer had been intended to place the property beyond the reach of creditors.[7] In June 1980, the district Court authorized judgment to be executed on the property on behalf of Cooper. Rev. Faw filed for personal bankruptcy in September 1980 pursuant to the voluntary provisions of Chapter 13 of the Bankruptcy Act. In his bankruptcy petition, Rev. Faw listed residence as his only real property; he did not list any of his

commercial property. Additionally, Rev. Faw did not report the commercial property as an when asked to respond to questions by the Bankruptcy Trustee at the first meeting of creditors.[8]

8. In June 1981, the Bankruptcy Court found that the 1978 conveyance of the commercial property, like the 1976 conveyance of his residence, was fraudulent. The Bankruptcy Court held, in this and a subsequent order, that Rev. Faw had engaged in a continuous effort to defraud Cooper and other creditors of their claims.[9] The Bankruptcy Court further held that Rev. Faw's failure to report either the conveyed or the unconveyed commercial property in his 1980 bankruptcy petition and to the Bankruptcy Trustee was deliberate and constituted false oaths. Based upon its findings, the Bankruptcy Court ordered the voluntary bankruptcy which had been filed under Chapter 13 to be converted for cause to a Chapter 7 proceeding, thereby permitting Cooper to participate in any distributions ordered by the Bankruptcy Court. Rev. Faw's Chapter 13 plan had not so provided for Cooper. Ultimately, Rev. Faw borrowed the money to pay Tire's obligation to Cooper and a settlement was reached in February 1982.[10]

9. The ALJ did not believe that Rev. Faw's attempts to show mitigating circumstances with respect to the conveyances and false oaths substantially nullified the adverse impact of the court rulings. He found that Rev. Faw's efforts to show mitigation amounted to little more than attempts to relitigate the questions dealt with by the court rulings, which are conclusive for purposes of the Commission's proceeding. The ALJ found that Rev. Faw was an important figure in Community and that his behavior could not be condoned. However, the ALJ did find that Rev. Faw was a credible witness and that the record evidence did not warrant the conclusion that Rev. Faw misrepresented facts or lacked candor in his testimony in this proceeding. He also found that the conduct was not broadcast-related, was isolated, was not part of a pattern, and was remote in time. Accordingly, he concluded that it did not have any predictive value with respect to Rev. Faw's performance as a broadcaster. The ALJ, relying on the Review Board's Decision in *Central Texas Broadcasting, Ltd.*,[11] therefore imposed no demerit against Community based on Rev. Faw's fraudulent conveyances.[12]

10. The Board disagreed with the ALJ's analysis. [13] The Board found that, although Rev. Faw's misconduct was not broadcast-related, it was "rife with moral turpitude." In the Board's view, this type of misconduct is especially significant because the Commission relies on the accuracy and truthfulness of licensee submissions. The Board also found that Rev. Faw's misconduct consisted of two separate fraudulent conveyances and two false oaths which occurred as recently as 1980, after the filing of Community's application on May 16, 1980. The Board also stressed that Rev. Faw is Community's most important principal. Although the Board declined to disqualify Community, holding that the Commission generally reserves the sanction of disqualification to misconduct occurring before the Commission itself, the Board assessed a substantial and decisive comparative demerit.

III. EFFECT OF POLICY STATEMENT

11. On January 14, 1986, during the pendency of the instant appeals, the Commission adopted its *Policy Statement*, which by its terms is applicable to such pending appeals.[14] This action has significant impact on the resolution of this case.[15] Most immediately, the *Policy Statement*abolished the practice of considering character in comparative proceedings, except insofar as an applicant' basic qualifications are called into question.[16] Thus, the Board's imposition of a demerit based on Rev. Faw's character deficiencies can no longer be upheld. However, we cannot simply delete the demerit imposed by the Board, thereby reversing the result in this case, granting Community's application, and ending this case without further consideration of the misconduct involved here. In the *Policy Statement*, we expressed concern about applicant misconduct that we believe could impeach an applicant's basic qualifications under some circumstances. Because the *Policy Statement* governs our analysis of the conduct at issue here, We must reexamine the facts of the instant case in light of its standards to determine whether Community has the requisite basic character fitness to qualify it for a license.[17]

12. Consistent with the *Policy Statement*, we are focusing our attention here only on that misconduct which is "clearly relevant to the licensing process."[18] Thus, we are interested only in that misconduct which reflects on the "likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies." [19] One of the types of conduct we have found to have a potential bearing on this issue is fraudulent representation to another governmental unit, because of the possibility that the applicant may engage in similar misbehavior in dealing with the Commission.[20] Rev. Faw's false oaths found by the U.S. Bankruptcy Court in the course of a bankruptcy proceeding are encompassed by this policy and are the focus of our review here. The fraudulent conveyances in which Rev. Faw was involved remain relevant to our determination only to the extent that they reflect on the significance of the false oaths, because, although adjudicated, there has been no criminal conviction for those conveyances, which is a prerequisite for our considering non-FCC misconduct involving a false statement or dishonesty other than a misrepresentation to a government agency.[21]

13. In considering whether Rev. Faw's false oaths weigh heavily enough here to disqualify Community, we have reexamined the record in light of the factors enumerated in the *Policy Statement*. These factors include "the willfulness of the misconduct, the frequency of such behavior, and its currency,... [t]he seriousness of the misconduct, the nature of the participation, if any, of managers and owners,... the efforts made to remedy the wrong... (and] the applicant's record of compliance with our rules and policies, if any."[22] Our conclusion from the record before us is that Community cannot be found qualified.

14. The determinative factors in the final analysis in this case are the willfulness and seriousness of Rev. Faw's misconduct and his close involvement with the applicant as its chairman, director, and planned general manager.[23] We give substantial weight to the Bankruptcy Court's finding that Rev. Faw and his wife made a false oath when they "knowingly and fraudulently" failed to list in their bankruptcy petition commercial property that they owned and had not conveyed, as well as property they had fraudulently conveyed, and that this false oath was repeated when they again failed to disclose ownership of this property to the Trustee in Bankruptcy during the first meeting of creditors. [24] Although these two false oaths were made in the course of a single bankruptcy proceeding, we cannot isolate them from their context of

a business dispute that was carried on over several years and included two separate, adjudicated instances of fraudulent property conveyance, as well as the failure to disclose the ownership of property in the bankruptcy proceeding. This course of conduct, including the false oaths, is what the Bankruptcy Court characterized as a "continuous effort to defraud Cooper Tire of its claim, and evade its obligations to that creditor." [25] Although we are not concerned with the business dispute between Rev. Faw and Cooper, as such, it is relevant that the problems associated with that dispute culminated in a serious, material, and repeated misrepresentation in the bankruptcy proceeding. We view the making of false oaths as serious because they go to the heart of the bankruptcy proceeding, *i.e.*, the disclosure of assets so that the interests of the Faws and their creditors can be fairly considered. We note that initially it was the Faws, not their creditors, who sought the protection of the bankruptcy laws under the more favorable adjustment of debt provisions of Chapter 13. We note also that the ALJ offered Community the opportunity to present evidence in mitigation of its misconduct.[26] Rev. Faw, however, simply repeated the arguments he had made earlier to the Bankruptcy Court,[27] which that court had found unpersuasive and rejected. The ALJ gave little weight to this effort to relitigate the findings of the court and properly concluded that the facts offered by Rev. Faw did "not measurably dilute" the court's findings.[28]

15. In weighing Rev. Faw's misconduct, we have taken into account Rev. Faw's eventual repayment to Cooper and Rev. Faw's previous experience as a television program producer for Truth Temple and earlier as a radio program producer for another church,[29] apparently without any violations of the Communications Act or the Commission's rules and policies. We have also considered that the misconduct occurred in 1980, and that there are no other allegations of misconduct regarding Rev. Faw or Community subsequent to the misconduct at issue here. However, on balance, we do not believe that these matters outweigh the seriousness of the willful misrepresentations in the bankruptcy proceeding. The record indicates that Rev. Faw borrowed money to settle with Cooper only after the Bankruptcy Court ruled on the second fraudulent conveyance and the false oaths and after the court compelled him to make provisions for his obligation to Cooper. [30] Rev. Faw's production experience is relevant to a comparative consideration of Community's qualifications under the best practicable service criterion of the *Policy Statement on Comparative Broadcast Hearings*,[31] but it is of little relevance in predicting Community's basic qualifications to perform as a licensee, because it does not demonstrate whether he would adhere to the Commission's Rules as a licensee; as a producer Rev. Faw was not directly subject to the Commission's Rules. The passage of time since the false oaths were made must also be viewed in the context of when Community's application was filed, *i.e.* about four months before the false oaths were made. Community's application was designated for comparative hearing within six months of the Bankruptcy Judge's order, and the issue regarding Community's qualifications was added nine months later, two years to the day from the first false oath. Under the circumstances in this case, we do not believe the time consumed by litigation should in and of itself be found to mitigate the seriousness of the issue before us.

16. We wish to emphasize that an adjudication of misrepresentation before a government agency does not necessarily require an applicant's disqualification. We reach our conclusion here only after weighing the two adjudicated false oaths of Rev. Faw in their context against the countervailing factors of his eventual settlement with Cooper (albeit one that occurred only after the Bankruptcy Court's adjudication against him), the passage of time consumed by this litigation, and the fact that the ALJ found Rev. Faw to have "made a good faith effort to recall and relate the facts" during the hearing.[32] On balance, however, we cannot assure ourselves from the record before us that Community under Rev. Faw's direction would be more attentive to government requirements or more forthcoming with the Commission than Rev. Faw was with the Bankruptcy Court were Community at some point to face problems affecting its performance as a licensee.[33] In the absence of other evidence showing a propensity for truthfulness subsequent to the bankruptcy adjudication, the fact that the ALJ found no basis to add a misrepresentation or lack of candor issue in this proceeding cannot outweigh the adjudication of willful misstatements in the bankruptcy proceeding. For this reason, we must conclude that Community is not qualified to be a licensee on this record.

17. In view of the foregoing, we agree with the Board's conclusion that Community's application should be denied and Kannapolis' application should be granted.

IV. SETTLEMENT AGREEMENT

18. During the pendency of the Applications for Review, the parties proposed to settle this proceeding. Under the terms of the Settlement Agreement, Community's application would be granted and Kannapolis' application would be dismissed. In view of our holding herein that Community lacks the requisite qualifications to be a Commission licensee, we cannot approve the Settlement Agreement. It is well-established that construction permits may be awarded only to fully qualified applicants, and the proposed settlement here contemplates the grant of Community's application.

19. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed October 1, 1984 by Community Action Communications, Inc. and WCCB-TV, Inc. ARE DENIED.

20. IT IS FURTHER ORDERED, That the Decision of the Review Board, FCC 84R-59, released August 30, 1984 (98 FCC 2d 546 (Rev. Bd. 1984)), IS MODIFIED as indicated herein.

21. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Agreement and Dismissal of Application filed June 19, 1986 by Kannapolis Television Company, a Joint Venture and Community Action Communications, Inc., as Supplemented July 3, 1986, IS DENIED and the associated Settlement Agreement IS REJECTED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] WCCB is an intervenor.

[2] Focus Television Company is the predecessor in interest of the current applicant Kannapolis Television Company. To avoid confusion, we will refer to both as "Kannapolis" throughout.

[3] *Focus Television Co.*, 98 FCC 2d 546 (Rev. Bd. 1984), *reversing*, 98 FCC 2d 556 (Admin. L.J. 1984).

[4] *Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon.denied*, October 16, 1986. (hereinafter *Policy Statement*).

[5] For further discussion of these facts, *see* 98 FCC 2d at 574-75, 577-87.

[6] Rev. Faw conveyed his interest in the developed portion of the property formerly occupied by Tire on which commercial buildings were located. He did not convey the undeveloped portion of the property. According to Faw, the failure also to convey the undeveloped portion of the property resulted from an inadvertent oversight by his attorneys. In reaching its decision, however, the Bankruptcy Court noted that Rev. Faw made no effort to secure supporting testimony to that effect from those lawyers. *In re Dewey Garland Faw*, No. C-B-80-667 (Bankr. W.D.N.C. June 1, 1981) at 4-5. See 98 FCC 2d at 586, 587 n.59.

[7] The District Court found, *interalia*, that the conveyance had been without valuable consideration and had left Rev. Faw insolvent. *Cooper Tire & Rubber Co.* v. *Tire Savings, Inc.*, No. C-C-77-096 (W.D.N.C. Nov. 30, 1978), *aff'd*, No. 79-1150 (4th Cir. Jan. 29, 1980). Under North Carolina law, these factors alone were sufficient to make the conveyance technically fraudulent even without a finding of actual fraudulent intent. *See Aman v. Waller*, 165 N.C. 224, 81 S.E. 162 (1914). On appeal, the United States Court of Appeals for the Fourth Circuit reached only the question of technical fraud in affirming the District Court's ruling.

[8] 98 FCC 2d at 586.

[9] Id.

[10] *Id.*

[11] 90 FCC 2d 583 (Rev. Bd. 1982), *modified*, FCC 83-415, released September 21, 1983, *recon. denied*, FCC 84-73, released March 15, 1984.

[12] 98 FCC 2d at 588-90.

[13] *Id.* at 551-53.

[14] 102 FCC 2d at 1235.

[15] We have examined the parties' Applications for Review. We see no basis to disagree with the Board's interpretation of the law which applied at that time.

[16] 102 FCC 2d at 1230-32.

[17] In this regard, we disagree with the Bureau's views expressed in its Comments on the parties' Settlement Agreement. Whereas the Bureau notes, as we do, that the Policy Statement abolishes comparative character demerits, its analysis does not address additional considerations concerning the relevance of nonbroadcast misconduct under the *Policy Statement*.

[18] 102 FCC 2d at 1181.

[19] *Id.* at 1196.

[20] *Id.*

[21] *Id.* at 1205

[22] *Id.* at 1227-28

[23] Rev. Faw's involvement is described above and is fully described at 98 FCC 2d at 575.

[24] *Id.* at 586, quoting from Focus Ex. 17, pp. 4-5.

[25] *Id.*, quoting from Focus Ex. 10, p.4, para. 2.

[26] 98 FCC 2d at 578.

[27] *Id.* at 579-81, 584-87.

[28] *Id.* at 589.

[29] Rev. Faw produced and directed a daily radio program beginning in 1972. Since 1975 Rev. Faw has produced and written a weekly television program. Truth Temple maintains its own broadcast production facilities. 98 FCC 2d at 576.

[30] *Seeid.*at 586-87. By converting the proceeding from a Chapter 13 adjustment of debt to a Chapter 7 liquidation, the court made available to creditors generally and Cooper in particular the property Rev. Faw had sought to protect. We also note that the settlement was almost six years after the indebtedness was incurred.

[31] 1 FCC 2d 393 (1965).

[32] *Id.* at 589-90. Although Kannapolis had sought a misrepresentation issue against Community because of some inconsistences between Rev. Faw's testimony and that of another witness, the ALJ found no material conflicts in this testimony. For this reason and because he found Rev. Faw to be credible, he refused to designate the issue.

[33] *Compare with Catamount Broadcasters, Inc.*, 70 FCC 2d 913 (Rev. Bd. 1976). There the applicant had a 20-year unblemished record as a nonlicensee and repaid the victim of his fraudulent misconduct. More significantly, seven years of unblemished performance had transpired since the misconduct, indicating rehabilitation. *Cf.* 102 FCC 2d at 1228-29. Moreover, the transgression was judged to be isolated. *See also Katy Communications, Inc.*, 87 FCC 2d 764 (1981), in which the alleged fraudulent misconduct was judged to be isolated and remote (5 years prior to the application) and did not result in a final judgment.

INDEX

	Page
000.291 - authority delegated	1031
001.106 Petitions for Reconsideration	930
001.106 Petitions for reconsideration	844
001.1414 State Certification	966
001.209 Motions to enlarge, change or delete issues	930
001.221 - notice of hearing; appearances	1031
001.223 Petitions to intervene	844
001.429 Petition for reconsideration	829
001.46 Motions for extension of time	990
001.773 PETITIONS FOR SUSPENSION OR REJECTION OF NEW TARIFF	984
001.773 Pet'ns for suspension or rejection of new tariff fil	992
001.773 Petitions for suspension or rejection of new tariff	993
001.773 Petitions for suspension or rejection of new tariff	1024
001.795 Reports regarding interstate rates of return*	952
021.13 Real party-in-interest	1007
021.15 Site Availability	1007
021.15 Site Availability	1012
021.17 Financial Qualification	1007
021.17 Financial Qualification	1012
021.23 Major Amendment	1012
021.901(d)(2) One-to-Market Rule	1007
021.902 Frequency Interferene	1012
022.913 Cntent and form of applications	972
022.917 Demonstration of financial qualifications	923
022.918 Amendment of cellular applications	972
043.51 Contracts and Concessions	933
043.52 Reports of Negotiations Re: Foreign Communications Ma	933
043.54 Reports Re: Svces Perf'd by Telegraph Carriers	933
043.74 Reports Re: Svces Rendered Free or at Reduced Rates	933
061.38 Supporting info. to be submitted w/ letter of trans.	930
061.38 Supporting information to be submitted	1016
061.40 Private line rate structure guidelines	1016
063.01 Contents of Applications	921
063.01 Contents of Applications	922
063.01 Contents of applications	942
063.57 Availability of pole rights to cable operators	942
064.702 Furnishing of enhanced services and CPE	996
065.600 Rate of Return Reports*	952
068.318(b) Additional Limitations	798
069 Access charges	991
069.1 Application of access charges	1024
069.301 General	1024
069.4 Charges to be filed	991
073.202 FM Table of Allotments	976
073.202 FM Table of Allotments	1034
073.202 Table of Allotments (FM)	849
073.202, Table of Allotments	948
073.202, Table of Allotments	950
073.202, Table of Allotments	967
073.211 Power and antenna height requirements	938

073.3516 Specification of facilities 849
073.3525 Agreements for removing application conflicts 1037
073.3540 Application for voluntary assignment or transfer of 1025
073.3555 MULTIPLE OWNERSHIP 1020
073.3555 Multiple Ownership 1022
073.3555 Multiple ownership 802
073.3572 Processing of TV broadcast, LPTV and TV translator 849
073.3615 Ownership reports 802
073.4280 Violation of laws of U.S.A. by station applicants; 1037
073.606 TV Table of Assingments 975
073.606 Table of Allotments (TV) 849
073.607 Availability of Channels. 849
073.609 Zones 849
073.610 Minimum distance separation between stations. 849
073.612 Protection from interference 849
076.501 Cross-ownership 802
076.55 Qualified television station; method to be followed.* 864
076.56 Mandatory carriage of television stations.* 864
076.58 Disputes concerning carriage.* 864
076.62 Manner of carriage.* 864
076.66 Input selector switches.* 864
090.179 Shared use of radio stations 809
090.376 Restrictions on operational fixed stations 926
090.601 Scope 809
090.603 Eligibility 809
090.611 Processing of applications 809
090.631 Trunked systems loading requirements 809
090.637 Restrictions on operational fixed stations 926
094.93 Provisions for Private Operational Fixed Use of the 977
1.115 Application for review of action taken pursuant to del 1037
100.19 License conditions 977
100.21 Technical requirements 977
100.3 Definitions 977
300.152 Application of Act 920
300.204 Hearings as to lawfulness of new charges; suspen. 930
300.211 Copies of Contracts to be Filed 933
300.214 Extension of Lines 921
300.214 Extension of Lines 922
300.221 Special Provisions Relating to Telephone Companies 920
300.222 Competition among record carriers (Current title) 829
300.224 Regulation of Pole Attachments 966
300.309 Action Upon Appl., form of Conditions Attached to Li 1005
300.309 Action Upon Applications; form of and conditions att 1031
300.309 Petition to Deny 1007
300.309 Petition to Deny 1012
300.319 Construction Permits 1005
300.605 Unauthorized publication or use of communications 990
500.1260 (Family Stations, Inc.) (Augusta, GA) 1032
500.1260 (Marvin G. Schwartz) (Widefield, CO) 861
500.1260 HDO (Barbara Kay Turner) (Citronelle, Alabama) 862
500.1260 HDO, (Gingrich Broadcasting Co. Ltd.,) (Port Huron, ... 854
500.1260 KDUN Radio 852
500.245 multipoint distribution service, comparative 1031
500.3035 Integration of Ownership into Management, Quantitat 842

500.3040 Integration of Ownership, Effectuation 786
500.3045 Diversification of Control of Mass Media 786
500.3050 Cross Interest 1022
500.3095 Character Qualifications 786
500.3095 Character Qualifications 1037
500.3125 Misrepresentation and Lack of Candor 982
500.3150 Alien Ownership 844
500.3170 Financial Qualifications 786
500.3170 Financial Qualifications 982
69 Access Tariffs 947
CFR 67 Jurisdictional Separations Procedures 925

U.S. GOVERNMENT PRINTING OFFICE:1986-181-195/60004